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THE INTERNATIONAL CONGRESSES AND CONFER-
ENCES OF THE LAST CENTURY AS FORCES
WORKING TOWARD THE SOLI-
DARITY OF THE WORLD

The pre-Tridentine œcumenical councils of the Roman Catholic church were, as Dr. Francis Wharton has well remarked,¹ international congresses, working toward the establishment of a uniform law for the civilized world. It was a law confined to one set of subjects; but among them were those having to do with the family relation, and which were therefore of the first importance to human society. Each nation of Christendom was represented in these gatherings by its sovereign or political delegates, as well as by its bishops, and it was for each nation, acting through its political departments, to ratify or reject such rules or laws in these respects as the council might propose.

The representation of political sovereignty in the Council of Trent was slight, and in the only œcumenical council since called by Rome — that of the Vatican — it was wholly wanting; Bavaria being the only power (though all European cabinets were consulted) which intimated a willingness to send an official delegate.²

The movement of modern society is away from ecclesiasticism in politics. It is improbable that national policies will ever again be formulated by councils called by the Vatican. These bodies, useful for such purposes in their day, have been replaced by something dealing with international relations in a simpler and more practical way. The modern congress or conference of nations, so far as it relates to the settlement of large questions of general and permanent importance, is a natural growth of the times. It serves to express public opinion — the prevailing opinion of the people in each of the participating powers.

¹ *Conflict of Laws*, I, § 171.

² *Memoirs of Prince Hohenlohe*. Macmillan's Ed., I, 395; II, 4.

The Congress of Munster may be said to be the first of this new order. It recognized accomplished facts. It confirmed the results of the Reformation by its rule of *cujus regio, ejus religio*. It set up the principle of a balance of power as the regulating force in the international politics of Europe. But it was not until the nineteenth century that gatherings of nations became common which either were unconnected with the settlement of the results of a war or, having such a connection, went beyond it in devising measures tending in greater or less measure to the general and permanent benefit of civilized society.

The Congress of Vienna in 1815 was the first of these at which social, ethical, and economic interests, having no immediate and pressing political importance, were the subject of definite and collective action. Two principles, especially, were affirmed, which were of the kind that makes for the solidarity of the world: — the duty of suppressing the slave trade as inhuman, and the free navigation of international rivers, because commercially desirable.

An Austrian statesman said, a few years ago, that in the eighteenth century liberal ideas in government came to the front; in the nineteenth century the dominating forces were those tending to nationality; and that the twentieth would be for Europe one of a struggle for existence between the nations in the field of commerce and industry. These generalizations are striking and suggestive, but they ignore the work of the nineteenth century in bringing nations into friendly relations with each other, and promoting the peace of the world. Of the new nations in Europe to which it gave being or accorded a particular character, those still existing were almost all created for the benefit of other nations. In America, the new-born nations were still more numerous, and each achieved its independence for itself; but no sooner had the Central and South American states renounced their connection with Europe than they sought to connect themselves with each other and with those of North America in some form of international union.

The Congress of Panama (in 1826) was called to give expression to this wish, and not without some hope on the part of the more ardent spirits that a federation of the American republics, if achieved, might lead to a federation of the world. It seems, said

General Bolivar, in his circular of invitation (of December 27, 1824) to the Congress of Panama, issued as liberator of Colombia and President of Peru, that if the world had to choose its capital, the isthmus of Panama would be selected for this august purpose, placed as it is, in the center of the globe; looking on the one side toward Asia, and on the other toward Africa and Europe. There, after a hundred ages, posterity would turn to learn the basis of the first alliances which would regulate the system of the relations of the American republics with the universe. What, he asked, would the isthmus of Corinth then be to that of Panama?³

The delay in the arrival of the envoys from the United States, the sickly climate, and the fear of each of the new powers that it might lose, by association with others, the full luxury of independence, rendered the work of the Congress of Panama substantially futile; but it led the way to others less ambitious that have accomplished more. Between 1826 and the present time, there have been held more than a hundred and twenty international congresses or conferences of a diplomatic character to promote objects of a social or economic nature, which deserve a place in the history of the world. A list of those which might fairly be included in this category is subjoined to this article, and the most cursory glance at it will suggest the wide range of topics considered, and the substantial advances effected by their means in the organized concentration of human society.⁴

That which stands out most prominently, because it touches every man's daily life, is the formation of the Universal Postal Union. This now embraces the entire civilized world and a considerable part of that which remains uncivilized. Cheapness, ease, and certainty

³ Am. Annual Register, 1825-6, Doc. 98.

⁴ The term "Congress" once meant an assemblage called to adjust international questions, as a consequence of war. It was formerly used in a still more restricted sense as an assemblage of sovereigns, for that purpose, leaving "Conference" to designate an assemblage of representatives, to act only subject to ratification. It is said by Fiore (*Nouveau Droit International Public*, Antoine's translation, II, 646), that now "Congress" is used only to signify an assemblage of representatives of nations to consider complex questions of general interest, while "Conference" is used to denote such an assemblage to consider particular questions of a local or temporary character. It has not been thought worth while in this article to adhere to this somewhat arbitrary distinction.

of communication between nations have been thus secured in such a way as to increase immensely the facilities both for friendly correspondence and commercial intercourse. The congresses of the Universal Postal Union, meeting statedly every five years, are in effect assemblies of accredited representatives of all nations for legislative purposes. These have undoubtedly done more than any other one thing to impress the world with the idea that a world-union for certain social and political ends is a practicable thing. It can no longer be sneered at as impracticable, because it exists and has existed as a working force for a whole generation. Every man who sends a letter from New York to Tokio with quick dispatch, for a fee of only five cents, knows that he owes this privilege to an international agreement, and feels himself by virtue of it a citizen of the world.

The rapid transportation of passengers and goods from one country to another has been greatly advanced by the work of some of these congresses. Boundary lines, in important particulars, have been almost effaced. International commercial tribunals, like that of the Rhine, have been established, and provision made for enforcing judgments against carriers in jurisdictions other than those in which they were rendered. Local impediments to navigation through taxation have been removed by purchase through international contributions. Uniformity in marine signals and nautical observations has been promoted. In the matter of weights and measures serious advances have been made toward setting up universal standards. For electric power such a standard has been attained by an international convention. Coinage has been so far brought under common regulations that the monetary unit in eight countries is identical.⁵ The telegraph and the telephone have been subjected to certain conditions with respect to international communication, which make for general convenience and the peace of the world.

Patents, trade-marks, and copyrights have been assured more than local protection by the Union for the Protection of Industrial Property, with its provision for stated international conferences to perfect the system.

⁵ In Belgium, Finland, France, Greece, Italy, Spain, Turkey and Venezuela, it is a silver coin of the value of 19.3 cents of American money.

Sanitary precautions have been imposed to make international intercourse more safe.

All these things, in making it easier and safer to travel from one country to another, and in extending the protection of many nations to the rights of property of the citizens of one, make for a policy of commercial competition. Huxley, in 1894, expressed his views of one effect of this in some weighty words. He had been asked to sign a memorial in favor of a general reduction of armaments. This he declined, on the ground that it would be a futile expression of opposition to a natural tendency of the times.

In my opinion, [he wrote,] it is a delusion to attribute the growth of armaments to the "exactions of militarism." The "exactions of industrialism," generated by international commercial competition, may, I believe, claim a much larger share in prompting that growth.*

Against such exactions of industrialism, international congresses undoubtedly interpose a considerable counteracting influence in tending to turn competition into co-operation, or at least to equalize opportunities for commercial success.

But if occasions for war have not been diminished, its attendant miseries have been softened. The virtual abolition of privateering followed the declaration of the Congress of Paris, in 1856. Humanity to the wounded has been safeguarded and the infliction of unnecessary suffering in combat restricted by the declarations of St. Petersburg and Brussels, the Geneva conventions, and the organization of the Red Cross societies.

The settlement of differences between citizens of different countries before the courts of justice has been made more easy by the adoption of uniform rules of private international law. Ten nations of Europe have now a common system of adjudication in this respect, in regard to the marriage contract and its discharge by divorce, the appointment and authority of guardians, and certain matters of judicial procedure; and to some of the conventions for this purpose as many as fourteen powers have adhered.

This has been the work of the four successive conferences at The Hague for the advancement of private international law, held between 1893 and 1904; and a similar conference at Montevideo in 1888 has brought similar results to five South American powers.

* *Life and letters of Thomas H. Huxley*, II, 397.

The initiative in the movement leading to these memorial achievements was taken by Italy, as early as 1861. Mancini was its father, and after more than twenty years of agitation, the government, by a circular dispatch to its ministers abroad, brought the question of convening a congress of the world to the attention of all the powers. The way meanwhile had been smoothed by the action of the Netherlands, which in 1874 had proposed to all the European powers an international conference on the subject of the execution of foreign judgments. Italy, Belgium, Russia, Austria, Denmark, and Sweden signified their approbation of the scheme. France made no answer. England and Norway declined to adhere to it. The idea, however, had now become so familiar that when Italy, after eight years, revived the project, there was so general an inclination manifested to try the experiment that she was encouraged to issue a formal call for such a congress as Mancini planned. The invitations were general, the place of meeting to be Rome, and the time November, 1885. Fourteen European and seven American powers accepted the invitation. A program was prepared looking to a treaty as to the execution of foreign judgments, and to a serious consideration of the expediency of attempting a general codification of private international law. Unfortunately, an epidemic of cholera swept over Italy during 1885, and the abandonment of the congress was the result.⁷

In public international law, a unifying influence of the first importance has proceeded from the conference at The Hague in 1899. But The Hague tribunal has even a higher aim than the unification of international law. It is a court of the world, and, as such, has only to prove itself worthy of the name to bring before it half the controversies between nations, which otherwise might lead to war.

It is not too much to say that this great agency for peace and right is the natural fruit of the preceding international congresses of the nineteenth century. They have broadened the law of nations. They have made it more humane. They have measured it by the rules of justice. It holds a firmer seat, by virtue of such declarations by assembled powers as that of the Conference of London, in 1871, on the Black Sea question, at which four great and two minor powers asserted it to be

⁷ Torres Campos, *Bases de una Legislación sobre Extraterritorialidad*, 193-6.

un principe essentiel du droit du gens qu' aucune puissance ne puisse se libérer des engagements d'un traité ne en modifier les stipulations, sans le consentement des puissance contractantes au moyen d'un arrangement amiable.

It is undoubtedly true that the earlier diplomatic congresses had very little connection with philanthropy or abstract right. They were convened to compose particular international differences. They looked, however, steadily to the future. They felt their power. A new force in world-politics was being evolved, and they fully appreciated it.

Professor Andrews has fitly characterized the Congress of Vienna as

a council of the powers, the object of which was to anticipate and control any differences arising between state and state.*

The great powers saw from the first the immense possibilities for Europe, within the grasp of every such assembly, and the ease with which they, by concerted action, could control its action. The treaty of Paris, concluded in the autumn of 1815, between Great Britain, Austria, Prussia, and Russia, made provision for future conferences of these powers at fixed intervals, to consider, *inter alia*, the measures which at each of these periods shall be considered the most salutary for the repose and prosperity of nations, and for the maintenance of the peace of Europe.

The results of the congresses of Paris (1818) at which France joined the concert; Troppau (1820); Laibach (1821), and Verona (1822), showed that Europe was disinclined to tolerate, except in case of some extreme emergency, an attempt by any knot of nations to control the internal policies of other nations.

A recent act of Congress, in respect to one matter relating to the international policy of the United States, looks to an invitation to other powers to assist in its enforcement by concerted action. This is the Immigration Act of February 20, 1907, which confers authority on the President to call, at his discretion, an international conference for the purpose of framing international agreements or treaties to regulate all matters pertaining to the immigration of aliens into the United States.

*The Historical Development of Modern Europe, 1815-1850, 102.

It deserves note that little has been accomplished by racial or continental congresses, as compared with those of a universal character.

Those of the South American states have generally proposed much and achieved little. It may be doubted if the three Pan-American congresses have been of any substantial effect in bringing the republics of the continent together. A central bureau has been organized, and Mr. Carnegie has given it a home; but how much better do we understand our southern neighbors, or they us? The weaker powers had hoped that the United States would stand between them and any encroachments of the stronger ones. Finding that there is to be no such new reading of the Monroe Doctrine, they are already declaring that the Congress of Rio de Janeiro may be the last of its kind, and showed the United States ready to do nothing but utter the platitudes of a stump speaker about right and justice, while looking for nothing but trade favors.⁹

The international congresses of a diplomatic nature have paved the way for an ever increasing number of those of an unofficial character. These have been greatly multiplied since the introduction of World's Fairs. Such expositions of art and industry make convenient centers for gatherings of men of different countries for a comparison of views on subjects of common interest. Eighty international congresses were planned in connection with one World's Fair, and thirty or forty have been organized by the managers of others. Many of the attempts to collect assemblages of this sort have been flat failures. Others have borne good fruit. Quite a number have resulted in a permanent organization, which has since held stated sessions and done solid work.

A large number of international societies also exist of an origin quite independent of any exposition, and with a title to success resting wholly on their own merits.

A list of the leading congresses, associations, and societies of an unofficial description organized during the last century is appended to this article. They have been roughly classified by their objects,

⁹ See the outspoken comments on the Rio de Janeiro Congress by A. E. Holder of Lima in the *Blatter für vergleichende Rechtswissenschaft*, etc., March, 1907, p. 498.

and it will be seen that of these there are few of more than local interest that have not been made the subject of consideration by such an assemblage. The number of meetings held by such bodies is over six hundred.

In one respect the unofficial congress tends, even more strongly than the official congress, to promote the solidarity of the world. Its members come together as servants of no master. They meet on a common footing. They are responsible only to themselves. As scientific investigators, or men of similar business pursuits, or perhaps humanitarians, they are drawn together by natural tendencies.

Augustus Birrell has remarked¹⁰ that

John Locke was fond of referring questions to something he called "the bulk of mankind" — an undefinable, undignified, unsalaried body, of small account at the beginning of controversies, but all-powerful at their close.

This unofficial set of men has discovered in our day that it has the advantage of numbers, and that in international gatherings called by no other authority than that of some of its members, it can exert no small influence towards preventing controversies, as well as towards ending them.

Our Secretary of State, in his recent South American tour, said in one of his addresses that the chief office of a foreign minister was to interpret the men of the nation to which he was accredited to the men of the nation by which he was accredited. The more the interpreters, and the freer the opportunity to interpret, the better will all peoples understand each other. International gatherings, of the kind now under consideration, afford precisely that opportunity. Those who attend them soon come to look through national peculiarities of thought or expression to the common humanity which lies behind. Friendships and connections are thus made that have no unimportant effect both on the literature and the industries of the world. Every nation is kept informed of the progress of civilization in every other, not by the cold reflection of the printed page, but by the warmer impression derived from immediate personal intercourse, unembarrassed by official formalities.

It is certain that of late years, as one political society is compared with others, there is noticed a sameness of color and movement, an

¹⁰ In the name of the Bodleian, 311.

institutional resemblance, a co-operative tendency, a closeness of relation between citizen and foreigner, not seen before since the division of the Roman empire.

In creating this new condition of things, steam and electricity have played a great part. So have wiser philosophies of religion; higher standards of ethics; a wider diffusion of education; a fairer administration of justice by the courts. But had it not been for the actual meetings, of an international character, face to face and hand to hand, of those interested in working out the same world problems, it is safe to say that progress would have been much more slow.

Most of the questions that arise between nations may, no doubt, be best settled through diplomatic representations or correspondence. Many advances have so been made that owe nothing to congresses of powers. The general adoption of uniform rules of ocean navigation is one of these. A mere "Trinity House" order, made in 1840, for the better prevention of collisions, with the aid of acts of Parliament passed in 1851 and 1862, and orders in council of January 9, 1863, and August 14, 1879, has furnished an acceptable basis on which most of the powers have successfully united by separate and independent legislation. But had the "Revised International Rules and Regulations for Preventing Collisions at Sea" originated in a maritime congress, it would not have taken nearly half a century to write them into the law of the world.¹¹

It is not the least function of an international congress, dealing with economic questions, whether it be public or private, to inform its members — and through them the world — of the governing facts.

Waldeck-Rousseau a few years since referred to the long succession of such gatherings in the nineteenth century as having dressé le bilan de l'avancement de toutes les sciences, et mis en commun entre tous les peuples les archives modernes du progrès social.

There is no nation to which these gatherings have brought more good than to the United States. The late Edwin L. Godkin described us, a dozen years ago, as

an immense democracy, mostly ignorant, and completely secluded from foreign influences, and without any knowledge of other states of society.

¹¹ The United States did not accede to them until the Act of Congress of March 3, 1885; 23 U. S. Stat. at Large, 438.

This is a caricature of the American people, even as they were when he first knew them, thirty years earlier; but it was sketched from life. Our environment is unfavorable to any close acquaintance with foreign nations, or their institutions and modes of thought. We have needed precisely the kind of means for giving such an acquaintance with them which international congresses and conferences offer. Nor have we failed to make good use of them. From the days when Elihu Burritt, sixty years ago, was organizing peace congresses in Europe, to those in which the United States is proposing in co-operation with Great Britain and Spain to bring the question of a concerted reduction of armaments before a congress of the civilized world at The Hague, Americans have been among those most interested in promoting discussion of international interests in international assemblies.

There is comparatively little in the approaches towards the solidarity of the world, achieved during the last century, which makes in the direction of political union. While governmental association for administrative purposes has been occasionally set up in limited fields, the strength of the movement has been towards a regulation of the management of each particular country by its own public officials, in accordance with rules previously established by international agreement.

The Hague conferences on Private International Law have not sought to declare the true rules on which all controversies of a private character, between nations and individuals, or individuals of different nationalities, or concerning foreign transactions, ought to be decided. They were content to mark out which of several possible rules should be applied in certain particular cases. The Montevideo congress adopted a different policy, but with less happy results.

In comparing the work of public and private international congresses, two things are to be remarked. The public congress is naturally under the domination of more particularistic influences. It was a true saying of Renan that

depuis le commencement du monde, on n'a pas encore vu une amiable nation.

It is the business of a nation to be selfish. Altruism is for individuals. It must ever be prompted by the voice of conscience or sentiment; not by that of law. This is intrinsically necessary. A government represents all and speaks for all who owe it allegiance. It can rightfully compel them all to promote its welfare. It cannot rightfully compel them all to promote the good of other nations, except so far as it may gain something from this for itself. Those who wish to engage in foreign missionary enterprises must not, though a majority in number, sweep into the current, by force of law, an unwilling minority. It is the duty of every man to love his neighbor, be that neighbor a fellow citizen or a foreigner, Israelite or Samaritan. It is not the duty of a nation to love any other nation. It is its duty to deal fairly with other nations and respect their rights. Policy may lead to closer relations with some of them; but it will always, at root, be a selfish policy.

A selfish policy may dictate, and often has dictated, co-operation between nations in the interests of humanity and civilization. But when it does, we shall commonly find that the initiative has been found in individual action, prompted by considerations sometimes commercial, sometimes scientific or philosophic, sometimes altruistic. So, and for similar reasons, it has often been found that the public congress of moment to the world has been the immediate consequence of a private congress. In that manner came the Red Cross conventions; first an international conference of private individuals at Geneva in 1863, and then, at its instance, an official call for the diplomatic conference held there in 1864.

The empire of Germany is more the fruit of the Zollverein of 1833 than of any of the political confederations by which it was preceded; and the Zollverein itself might never have spread so far, had it not been for the sentiment of nationalism so passionately voiced by the gathering of the Burschenschaft at Eisenach, only ten years after the congress of Vienna. The lofty monument now marking the spot where men from so many German universities pledged themselves to work for German unity, is an enduring testimony to the strength of public feeling in shaping the relations of neighboring states, so as to make for unity of purpose if not of administration.

The French physiocrats of the eighteenth century asserted it as a fundamental principle, that the natural laws of society are the universal laws of natural or physical order, applied to social relations. They may have carried their metaphysics too far, in working towards practical results in legislation; but there was sound truth at the bottom of it. It is the universal order of things to which all particular orders of things tend to conform, and against which, if found in opposition to it, they dash only to disintegrate and disappear.

The order of the physical universe in which separate planets and constellations move on in their different courses in such general harmony does not simply illustrate to separate nations the possibilities of social co-ordination. It furnishes an impulse towards such co-ordination; bringing before all men not only an intelligible principle, but something that appeals to each individual as the principle of his own world; of his own being.

This impulse will be felt as a cosmic force in precise proportion to the psychological contact of nation with nation. Until the days of steam transportation, there were few in any country, even among its leaders, who ever went far from their own land. The seventeenth century had indeed established the practice of maintaining permanent legations (*legationes assiduas*) for diplomatic intercourse; but it was an intercourse limited to official circles. Modern facilities for travel, modern uses of electricity, and the modern press have put the world, and even the embassy, on a different footing. There is no place left that is safe enough to hide state secrets. The telegraph and telephone have conquered time and space. The newspaper gives daily to every one for two cents, what a hundred years ago all the governments in the world could not have commanded in a year.

Nations have been brought together by material forces, starting into action greater immaterial forces. Electricity is finishing what steam began. Men come close together who breathe a common intellectual atmosphere; who are fed daily by the same currents of thought; who hear simultaneously of the same events; who are eager to disclose to each other whatever new thing, coming to the knowledge of any, is worthy the notice of all. It is from these conditions of human society that international congresses and conferences have

come to assume so large an importance; and it is an importance that must steadily increase rather than lessen, unless these conditions essentially change.*

SIMEON E. BALDWIN.

* A list of memorable international conferences, congresses, or associations of official representatives of governments, exclusive of those mainly concerned in dealing with the results of a particular war, forms part of this article and is printed in the Appendix at page 808 of this JOURNAL.

INTERNATIONAL UNIONS AND THEIR ADMINISTRATION

The dominant note of political development during the nineteenth century was undoubtedly nationalism, and the political forces of the century, intricate and involved as their action was, may be understood and analyzed with the greatest clearness from the point of view of the struggle for complete national existence and unity which was going on in all the principal countries of the earth. Nations are readily personified, and there is a unity and sequence in their action which makes it appear very concrete when compared with other political influences and movements. Thus, when toward the end of the century, after the great struggles in the United States, Germany, and Italy had been decided in favor of the national principle, it seemed as if the latter were bound to exercise an almost exclusive sway over the future destinies of humanity, as if the twentieth century would be taken up with a fierce economic and military competition among the nationalities who had achieved a complete political existence. Under such conditions, international or diplomatic action would have had for its main function the maintenance of a political balance or equilibrium which would prevent the undue aggrandizement of any one state or nation. Such indeed had been the original and continuing purpose of diplomatic action.

Yet notwithstanding the definiteness and energy with which the action of nationalism asserted itself in nineteenth century politics, nevertheless the force of its current was all the time diminished and its direction modified by that other great principle of social and political combination which we may call internationalism, and which comprises those cultural and economic interests which are common to civilized humanity. During the Middle Ages the unity of civilization rested largely upon a cultural and religious basis. In our own age, such bonds of union have been powerfully supplemented by the growing solidarity of the economic world, as well as by the

need of experimental and applied science to utilize the experience and knowledge of all countries. The existence of such an underlying economic unity of the civilized world has been borne in upon the nations with greater force every succeeding year. The development of the facilities for communication, bringing with them a great increase in the intercourse and exchange of commodities among nations, first convinced the latter of the need of international arrangements of an administrative nature. The inconveniences and delays caused at the point of transit from one national territory to another by the existence of different administrative methods and harassing regulations were such a serious impediment to the natural currents of trade that they could not long be tolerated. It was thus that a strong demand arose for the regulation of the international telegraph and postal service, of arrangements with respect to the transfer of freight on railways and similar economic activities. It is not difficult to see the impulse toward joint international action which would arise from economic relations such as these.

Other economic activities, such as manufactures, insurance, etc., while they also felt the importance of international economic relations, were not so directly and inevitably affected as were the transportation interests. Yet in this field another principle became powerfully active, inducing nations to seek for a co-operative basis in matters of national industry and economic enterprise. This principle is found in the need of raising the level of competition. It was soon discovered that after a nation had within its territory introduced some improvement in the condition of its industries and its labor such as required an additional expenditure of money, its industries might, at least temporarily, be seriously threatened by the competition of those countries in which such regulations as the above had not as yet been adopted. The industrial interests which might at first have opposed the introduction of such measures of protection now became eager partisans of the extension of these regulations to competing nations by means of treaties and administrative arrangements. The international movement for the improvement of industrial and social conditions therefore found powerful support, not only among men who had originally favored such reform, but among those interests which through its introduction in certain

nations had been placed in a position of disadvantage in international competition. This is the ground for international action in matters affecting agriculture, labor, sugar production, and similar economic interests. Closely allied to this movement and preceding it in time is the movement for the international protection of patents and copyrights.

A third cause for international action is found in the situation under which a number of nations find themselves threatened by conditions existing in less civilized countries, and also where the instrumentalities and processes of their economic activities extend upon and beyond the seas where individual national jurisdiction ceases. Thus the protection of public health against the importation of epidemics and the protection of sub-marine cables in high sea areas became the subject-matter of international agreement and international administrative action.

Civilized nations, being desirous to arrange their affairs in the most scientific and effective fashion, feel the need of making use of experience and knowledge wherever it may be found. The recognition of the fact that no people has a monopoly of the best scientific and administrative processes has lead the nations to seek opportunities for the exchange of experience and the knowledge of methods such as are afforded by congresses of experts in various fields of public activity. Many of the unions formed more directly for administrative purposes also incidentally subserve the end of constituting a center for the exchange of reliable information.

The number and extent of the lines of international activity already entered upon are surprising. It is not so much the case that nations have given up certain parts of their sovereign powers to international administrative organs, as that they have, while fully reserving their independence, actually found it desirable, and in fact necessary, regularly and permanently to co-operate with other nations in the matter of administering certain economic and cultural interests. Without legal derogation to the sovereignty of individual states an international *de facto* and conventional jurisdiction and administrative procedure is thus growing up, which bids fair to become one of the controlling elements in the future political relations of the world.

In order to give an adequate account of these important movements, a monographic study of each of them would be necessary. No more will be attempted in the present paper than to give an indication of the main historical facts concerning the formation of these various unions and the conclusion of the conventions upon which they rest. Special attention will be given to the initial difficulties in the way of reaching such agreements, and to the manner in which those existing were, as a matter of fact, arrived at. The diplomatic and administrative agencies employed in the formation of these unions or created for their purposes will be reviewed, as well as the influence of private initiative and associated effort in bringing about joint action by the governments. We shall also note the functions attributed to the international organs, and the main administrative principles and methods established. The present paper will be confined to a brief account of the various international unions from these points of view. A more thoroughgoing analysis, critical and comparative, of the arrangements and institutions thus established, viewed in their relation to general international law and to the administrative systems of the individual states, will be given in a later paper.¹

I. COMMUNICATION

The Telegraphic Union. (*L'Union des administrations télégraphiques.*) The first important international administrative union to be established was the Telegraphic Union. From 1849 on, treaties had been made between individual European states concerning telegraphic communication. In 1850, a German-Austrian tele-

¹ General references: Poinard, L., *Le droit international au XXe siècle*. Paris, 1907. Moynier, G., *Les bureaux internationaux*. Geneva, 1892. Kazanski, P., *The General Administrative Unions of States* (in Russian). Odessa, 1897. Kazanski, "Die allgemeinen Staatenvereine," in *Jahrb. d. internat. Vereinigung*, Vol. VI. Berlin, 1904. Descamps, *Les offices internationaux*. Brussels, 1894. Lavollée, "Les unions internationales," in *Rev. d'hist. dipl.*, I, 331. De Seigneau, in *Ann. de l'Inst. de droit internat.* XX 59, 97. Fiore, "L'organisation juridique de la société internat." in *Rev. de dr. int.* 1899. P. 105, 209. Olivart, Marqués de, *Tratado de derecho internacional público*. Vol. II. Madrid, 1903. Ullmañ, Völkerr. 282. Frank, *Les Belges et la paix*. Brux., 1905. The newly founded *Rev. de dr. internat. privé* (ed. by Darras) will give special attention to international administration. Poinard, *Droit International Conventionnel*, 1894.

graph union was established; and through the convention of October 4, 1852, at Paris, all Continental states which at that time had state telegraphs regulated the mutual relations of their services. Through such conventions as these the international relations in this matter were made more satisfactory, without, however, securing that uniformity and regularity which the interests of the various nations really demanded. The desire for a universal treaty and union concerning telegraph administration led to the convening of a conference at Paris in 1865. Twenty states were represented upon this occasion, each state being represented by its diplomatic agent at Paris, assisted by an expert delegate. The conference, therefore, had the double character of a diplomatic congress and a meeting of expert representatives of the various administrations. The results of the work of the conference were, in accordance with this double character, divided into a convention, or treaty, signed by the diplomatic representatives, and a *règlement*, by which the administrative details were regulated, and which was signed by the expert delegates. These conventions resulted in a great simplification of the international service as well as in a considerable reduction in the tariff rates. The discussions of the conference are of exceptional interest as it constitutes the first important attempt to arrange for permanent co-operation between sovereign states in administrative matters. Many difficulties of local opposition had to be overcome before an agreement could be reached. As a precedent for international action, the conference of Paris must be accorded a very high importance. The Telegraphic Union which was formed at this conference embraced all the states there represented, to which were added during the subsequent three years, eight further states and colonies.

The first regular conference of the Union took place at Vienna in June, 1868. The double nature of the conference, composed as it was of diplomatic and technical representatives, was preserved on this as well as on subsequent occasions. Five further members were admitted at this time, including the telegraph administration of British India. The most important act of the conference of 1868 was the establishment of an international bureau having its seat at Berne, and acting as a central organ of the Union. At the conference at Rome in 1871, representatives of important private

telegraph companies were admitted as advisory members. The conference at St. Petersburg, 1875, recast the constitutional form of the union by distinguishing more carefully between the matters to be dealt with in the diplomatic convention and those to be included in the *règlement*. The convention was made, in a way, the constitution of the Union, laying down the fundamental principles which were accepted as expressing the essential relations and duties of the members and the permanent basis of the administrations. The *règlement*, on the other hand, was composed of those administrative regulations by which the details of the international administration were fixed and which were susceptible of gradual modification, corresponding to the change of character of the administrative relations. A similar basis of division had been used the preceding year in the formation of the General Postal Union. Among the matters which were laid down by the convention are the general classification of telegrams, the admission of cipher dispatches, conditions of suspending the service, the right of declining responsibility for loss, etc. The details of the tariff and the application of the above rules are fixed by the *règlement*. The Telegraphic Union is at present composed of over fifty states and colonies. Its regulations are observed also by the submarine cable companies.

It is a general principle illustrated by the Telegraphic Union, that in such international combinations, the sovereignty of each member demands that an important act of the Union can only be undertaken by unanimous consent; but the members of the Union, of course, remain free to conclude among themselves special agreements, not conflicting with the general treaty, which their special situation and interests may require. Should certain members refuse to accede to the establishment of a proposed reform, those desiring the change may form a *restricted union* for such special purpose.

The International Telegraphic Bureau began its operations January 1, 1869. It is placed under the supervision of the Swiss government, and its expenses are met by the states in proportion to the importance of their telegraphic intercourse. Its original budget was only 50,000 francs per year, of which, as a matter of fact, only sixty-five per cent. on an average was used during the earlier period. The conference at St. Petersburg increased the budget to

60,000 francs. The attributes of the bureau as determined by the convention are as follows: It is to collect information concerning international telegraphy; to give due form to demands for changes in the tariffs and in the service regulations, and to give notice of such changes; to make special studies and investigations committed to it by the conferences of the Union.

The *règlement* provides that the various telegraphic administrations shall keep each other informed through the intermediary of the bureau of all changes and improvements of their service and of interruptions in communication. They shall also furnish to the bureau all statistical information, so as to enable the latter to issue a general statistical account of the international telegraphic services. At the periodic conferences of the Union, each state is entitled to one vote. A program, worked out beforehand under the initiative of the state where the conference is to be held in consultations with the other governments interested, forms the basis of discussion. Committees are appointed to consider in detail the various propositions. The resolutions of the conference are not binding until accepted by all the administrations of the contracting states, although for their adoption by the conference only a majority vote of the delegates present is necessary. A change of the fundamental convention would of course require the diplomatic action of all the treaty powers.

The invention of *wireless telegraphy* raised so many novel problems in international law and administration, that special conferences have met in which these matters have been acted upon. A preliminary conference took place in Berlin in 1903. This was followed by a more formal conference in 1906, which resulted in the framing of a convention. The convention was signed by the representatives of twenty-six powers. It refers especially to the obligatory transmission of wireless telegrams between the coast and ships. The convention was accompanied by a protocol containing subsidiary arrangements, and a *règlement*. The International Telegraphic Bureau at Berne has temporarily acted as a central office of correspondence and information in connection with this matter,² but a special bureau for wireless telegraphy is now to be established.

² Fischer, P. D., *Die Telegraphie und das Völkerrecht*, Leipzig, 1876. Saveney, E., "La télégraphie internationale," *Rev. d. Deux Mondes*, Sept. and Oct., 1872.

The Universal Postal Union. Beginning with the year 1802, a large number of conventions for the purpose of regulating international postal communication were concluded by groups of two or more nations. After the middle of the century, this international interest assumed such proportions that the establishment of a régime of uniform regulations appeared highly desirable. In 1862, the United States government officially took the lead in this matter; the Department of State called attention to the many inconveniences flowing from the lack of unity and suggested the holding of an international postal conference. Such a conference was accordingly held at Paris in May and June of 1863, on which occasion fifteen states were represented. The avowed purpose of the conference was not as yet to produce definite treaty regulations, but, on the basis of full and free discussion, to clear up the general principles which should dominate international postal administration. Many practical difficulties in the way of a unified system revealed themselves, especially in connection with the freedom of transit and of division of the proceeds from mail passing through two or more jurisdictions. In its resolutions the conference declared itself in favor of thirty-one principles, which covered, among other matters, the transmission of letters with declared value and of inferior classes of mail, a uniform system of tariffs, and the establishment of a uniform transit due.

In the subsequent decade, not much progress was made, but in 1869, the German Postal Union began to negotiate with a view to calling a new congress. The Franco-German War interrupted these negotiations, but they were taken up again at its conclusion, and finally Switzerland convoked a conference to meet in September, 1873. Russia and France at first indicated their unwillingness to take part in a conference. The French administration was under the impression that the formation of a postal union would cause it severe financial loss on account of the lowering of transit charges.

Renault, L., *Rapports Internationaux. La poste et le télégraphe.* Paris, 1877. Carmichael, E., *The law relating to the telegraph, the telephone, and the submarine cable.* London, 1903. Kazanski, P., "L'Union Télégraphique Internationale." *Rev. d'droit int.*, 1897, p. 451. Meili, *Die internationalen Unionen, etc.* Leipzig, 1889. *Journal Télégraphique*, Berne, since 1869. *Archiv f. Post u. Telegraphie*, Vol. XXXII, p. 65-89. *Protocol de la Conference prelim. concern. la télégraphie sans fil.* Berlin, 1903. *Treaties in Arch. dipl.*

This consideration, combined with the fact that the movement had been initiated by the German government, led to the reluctant attitude assumed by France. After a short delay, however, Russia and France agreed to meet, and the conference finally came together on September 15, 1874. The points to be considered had been very carefully prepared by the German postal administration under the guidance of Postmaster-General Stephan, and the conference therefore was enabled immediately to enter upon the discussion of specific problems of organization.

Twenty-two states were represented at the conference; the delegates were in most cases the heads of postal administrations or high officials connected with the same. The excellence of the preparatory labors enabled the congress to finish its work in less than four weeks, and in this short time to create the constitution and regulations of the General Postal Union. As in the case of the Telegraphic Union, a convention fixed the general principles upon which the Union and its administrative work are based while details were worked out in a *règlement*. The leading principles established were the complete freedom of transit from one jurisdiction to another, and the creation of a practically unified postal territory comprising all the treaty states. It is, of course, necessary to distinguish between freedom and gratuitousness of transit. The latter could not under existing circumstances be established, but the share of the fee which the state of transit could claim was regulated. States of central location, like Belgium and France, had a very direct financial interest in this matter.

The organization of the Union resembles that of the Telegraphic Union. Periodical congresses of delegates are held at which the regulations may be modified. Such modifications must, however, be unanimously accepted in order to become valid. The member states have reserved the right to make special treaties and to form *restricted unions* with respect to matters of special interest to themselves. Such treaties exist, for instance, between the United States and Canada, Mexico, as well as other states. Should controversies occur between the administrations of two or more members, an arbitration court may be instituted, composed of the representatives of impartial member states nominated by the government concerned.

The administrative organ of the Union is the International Postal Bureau, located at Berne. It is under the supervision of the Swiss government. Its duty is to gather, publish, and distribute information of all kinds on the international postal service; upon the demand of the parties interested to give advice on controversial questions; to give regular form to propositions for the modification of the *règlement*; to notify the various administrations of adopted changes; to facilitate the operations of international accounting; and, in general, to make such studies and engage in such work as shall be in the interests of the Postal Union. The official language is French, and the bureau publishes a monthly journal, "*L'Union postale*" in French, English, and German. The postal convention of 1874 was ratified by the action of the diplomatic representatives of the powers at Berne, in May, 1875.

A very important postal congress was held in Paris in 1878. The French representatives favored the conclusion of an entirely new convention. The conference, however, did not go beyond a modification in some details of the convention of 1874. The union at this time assumed the name of Universal Postal Union. The number of states and colonies represented had by this time risen to thirty-two. While the organization of the union was not materially modified, the voting right of colonies was regulated so as to give one vote each to British India, and Canada, and one vote each to the combined French, Spanish, Dutch, Portuguese, and Danish colonies. The regular congress meets every five years, but two-thirds of the members may call an extraordinary session. The *règlement* can be changed at the congress by a simple majority. In the period between congresses, the international bureau acts as intermediary for propositions made to the member states by any government. Such propositions, if affecting the most important parts of the convention, necessitate unanimity of all the member states for their adoption; otherwise a two-thirds vote would be sufficient. These provisions refer to votes given by correspondence in the interval between sessions of the congress.

Subsequent congresses (Paris, 1880; Lisbon, 1885; Vienna, 1890) concerned themselves very largely with the details of administration. The Congress of Vienna, however, instructed the international

bureau of the Postal Union to act as a clearing house for the adjustment of the mutual financial claims of the various national postal administrations. Each administration forwards to the bureau a monthly statement of its accounts with every other national administration. The bureau balances these accounts, collects from the administrations whose balance is unfavorable, and pays over the proceeds to the nations entitled to a balance. This congress also provided for an international service of newspaper subscriptions. In many European states subscriptions to periodicals and newspapers are arranged for by the postal service. The extension of this system so as to enable a subscriber to give his order and pay his subscription for some paper published in a foreign country, at the post office of his home town, was made possible by the arrangements adopted at Vienna. At this congress the Australian colonies were admitted to the union with the right of one vote.

At the present time the Universal Postal Union comprises fifty-five states and colonies. The postal rate has been made uniform throughout the extent of the union, no matter what the distance of transit involved may be. The Congress of Rome, in 1906, agreed upon a further reduction in the charges by permitting a greater weight to be carried in letters. By divers groupings of member states, numerous restricted unions for special purposes have been formed.³

The International Union of Railway Freight Transportation. From the earliest days of railway development in Europe, the necessity for international arrangements with respect to the transit of merchandise from one country to another became apparent. As early as 1847 there was founded the union of German Railway Administrations, which is still in existence, comprising one hundred and eight administrations in Germany, Austria, Hungary, Holland, Belgium, Roumania, and Russia. The affairs of the union are administered through the royal railway "direction" at Berlin, and every two years there is a general meeting for the revision of the regulations. The work of the conference is prepared by eight standing

³ Weithase, H., *Geschichte des Weltpostvereins*. Strassburg, 1899. *L'Union postale*, Berne, since 1875. Treaties of Oct. 9, 1874, and June 1, 1878, in *Archives dipl.* Meili, *op. cit.*

committees on various branches of the service, such as freight traffic, passenger traffic, exchange of cars, etc.

The idea of an international union for railway transportation was first suggested by two experts, de Seigneux and Christ, of Switzerland, who petitioned the Swiss federal council to call an international conference. Preliminary plans for such a union were worked out in Switzerland and in Germany, and in 1878, the first conference met at Berne. It was composed of expert delegates of the following countries: Germany, Austria, Hungary, Belgium, France, Italy, Luxemburg, the Netherlands, Russia, and Switzerland. The two prime movers for the conference acted as its secretaries. In a session occupying a month, the conference, on the basis of the preliminary studies, worked out the text of an international convention concerning railway freight traffic, a convention creating an international commission, and supplementary ordinances. The results of these labors were referred to the various governments which had been represented at the conference. They were carefully studied by the administrations concerned, and memorials suggesting improvements and modifications were handed in by the latter. A second conference was convened in 1881. It also met at Berne, and the same powers were represented. This conference introduced a number of important modifications in the convention. It suggested the creation of a central bureau in place of the commission provided for by the first conference. So careful were the administrations and governments interested that even as yet they were not ready to accept the results of the labors of these two conferences. After additional consideration a third conference was convened in Berne in 1886, which moulded the international convention and the regulations into their final form. It also adopted a protocol for the holding of a final conference of diplomatic representatives at which the convention might receive formal sanction. This conference took place in 1890. It was composed entirely of diplomatic delegates, and it accepted the convention as adopted by the third conference, with some minor changes. Ratifications were exchanged on September 30, 1892, and the union as well as its central bureau began operations on January 1, 1893.

The main portion of the convention thus carefully worked out by

the best expert talent of continental Europe is composed of a statement of general principles as well as of more detailed rules concerning the transportation of railway freight from one country to another. Among the chief matters thus regulated are the continuity of transportation under a single bill of lading, the form of which is determined by the convention; uniform regulations with respect to packing and to the transport of dangerous substances and breakable articles; the responsibility of railway administrations in international freight transportation, for delays, losses, and damages to goods. The inclusion of passenger traffic in the convention, though suggested, was not seriously considered because of the feeling that to introduce so difficult a matter might greatly embarrass the achievement of a plan for united action.

The organization of the union as determined by the convention is as follows: The administrative organ is the central bureau which is located at Berne. Its functions are: First, receiving communications from the contracting states and from the railway administrations interested and transmitting them to other states and administrations; second, to gather, arrange, and publish information of all kinds which may be important to the international freight service; third, at the demand of parties to pronounce arbitral sentences on controversies which may arise between different railways; fourth, to give due form to suggestions for the modification of the present convention, and to propose to the different states the calling of a new conference; fifth, to facilitate between the different administrations financial operations necessitated by the international freight service, the collection of arrears, and the assurance in this matter of stable relations among the various railways. The central office also edits an authoritative list of railway lines which form part of the international services. The original treaty provides that there shall be convoked, every three years at least, a conference of the states for the purpose of making necessary modifications in the convention. In the special *règlement* for the central bureau, it is provided that the Federal Council of Switzerland is to organize and supervise that institution. The expenses of the bureau are not to exceed one hundred thousand francs per year; they are borne by the contracting states in proportion to the length in kilometers of their

railway lines which are admitted to the international service. The central office is authorized to issue a publication in French and German (*Zeitschrift für den Internationalen Eisenbahntransport; Bulletin des transports internationaux par chemins de fer*). It is, moreover, instructed to act as agent for the liquidation of accounts due from one railway administration to another, and the method of demand and collection as well as the responsibility of the respective state for such dues are regulated in detail.

In agreement with the terms of the convention, the Swiss federal council has established a central bureau composed of a director, a vice-director, a juristic and a technical secretary, and the necessary clerical personnel. The international office, like the similar bureaus of the postal and the telegraph union, is placed under the direct supervision of the Swiss Department of Post Offices and Railways, and the general regulations made for these bureaus are also made applicable in this case. The most striking function of the central office is that of pronouncing judgment in controversies between different railway administrations. According to the ordinance of the federal council, the court is composed of the director of the bureau and two arbitrators. The latter, as well as two substitutes, are appointed by the federal council. At the desire of the parties or in cases of small importance, the director himself may act as judge without the assistance of the arbitrators. The control of the steps of the procedure is in the hands of the director, who presides in the court. In case of disagreement between him and the arbitrators, he may call in the two substitutes. In case of equality of votes, the opinion of the director is decisive. The services of this tribunal are gratuitous as far as the parties to the controversy are concerned. The judicial function of the central office has been appealed to in numerous cases. Prominent experts have acted as arbitrators, perplexing controversies have been settled, and the working of this institution has given great satisfaction.

The first conference for the revision of the international convention took place in Paris in 1896. The modifications which it introduced were of a technical nature. After prolonged negotiations, they finally went into effect in October, 1901. On account of these delays, a long period elapsed between the first and second revision conferences,

the latter of which did not meet until 1904. The feeling at this time was that, the international convention having proven very acceptable in detail and successful in its operations, and its provisions having entered into the administrative practices of all the countries concerned, radical changes should be made with great care. Future conferences should not consider matters which had not been carefully examined by the contracting parties before the conference, with a view to ascertaining the bearing of new propositions upon their respective systems and instructing their delegates accordingly. The conference concluded that it would be sufficient to have a general meeting once in five years. Important modifications were introduced in the technical details of the convention, without, however, affecting the organization of the union. The annual budget of the central office was increased to one hundred and ten thousand francs (Fr. 110,000), and arrangements were made for instituting a pensioning system for its officials and employees. At this conference an effort was made to have the arbitral function of the central office extended to controversies between the railways and the general public. This change was, however, not sanctioned, though the conference declared that officials of the central bureau might personally act as arbitrators. But such judgments are not to be published in the official bulletin. Several other proposals failed of adoption. The Swiss federal council favored the extension of the union to the transportation of passengers and baggage. The Russian government desired to have the international bureau instructed to work out and publish a complete statistical report on international railways, their traffic, and operation. The latter proposition was not accepted because the extent and cost of the undertaking was not perfectly clear to the conference, while the former appeared to necessitate previous negotiations among the various governments concerned.*

Navigation. The methods and rules of navigation on the high seas are a matter in which naturally all seafaring nations are interested. It is, therefore, not surprising that the procedure of

* *Procès-verbaux des délibérations de la conférence réunie à Berne au sujet d'une convention internationale en matière de transports par chemins de fer.* Berne, 1878, 1881, 1886. *Congrès international des chemins de fer, comptes rendus.* At the dates and places of various conferences. *Das Internationale*

international regulation has been employed to a certain extent for the regulation of signals and routes. A signal code was first adopted by England and France in 1864. Other nations from time to time joined in accepting this code, which was given a thorough revision in 1899. At the present time forty states have adopted it. Through the use of flags of various sizes, forms, and colors, ships are enabled to communicate with each other and thus an international sign language has been created.

England and France also led the way in the adoption of conventional rules with respect to routes of navigation, as well as night and fog signals. These rules also have been remodeled from time to time, especially at the conference of Washington, in 1889. They are at present accepted by thirty states, and though their observance has not been made obligatory on ships, they are as a matter of fact generally observed by navigators.

The work of harmonizing and eventually of codifying international maritime law has been discussed at the annual conferences of the International Maritime Committee, which have taken place regularly since 1897. The committee is the central organ of national associations in twelve leading states; it has its seat in Antwerp, and publishes a bulletin. Another body dealing with maritime interests is the International Association of the Marine, which was founded by French initiative. At its meeting at Lisbon in 1904, on which occasion the delegates of several governments participated, the association voted for the establishment of an international maritime bureau. These private and semi-public endeavors have been supplemented by the work of an international conference on maritime law, convened in Brussels in 1905 at the invitation of the Belgian government.⁵

Übereinkommen über den Eisenbahn-und Frachtverkehr. Berne, 1901. Zeitschrift für den Internationalen Eisenbahntransport. Berne, since 1893. Rosenthal, Ed., Internationales Eisenbahnfrachtrecht. Jena, 1894. Olivier, E., Des chemins de fer en droit internat. Paris, 1885. Eger, G., Das Internationale Übereinkommen, etc. Breslau, 1893. Meili, Das Recht der Verkehrs-und Transportanstalten. 1888.

⁵ Protocol and Proceedings, International Marine Conference 1889. Washington, 1890. Bulletin du Comité maritime internat. Antwerp. Rev. internat. de droit marit. 19:800, 937. Ann. de droit commerce. 18:323. Govare, P., in Rev. de droit internat. privé, I, 593.

II. ECONOMIC INTERESTS

The Metric Union. One of the most serious inconveniences of international commerce arises from a difference in the standards of weights and measures. The adoption of a uniform standard was therefore urged at an early date by the representatives of international commerce and by scientific associations. In 1867 the international geodetic conference at Berlin pronounced in favor of the universal use of the metric system. It also suggested the creation of an international commission which should supervise the keeping and duplication of standard units of measure, in order to avoid a gradual divergence among the various national standards. In 1869 the French government created a metrical commission (*Commission du mètre*), composed of French and foreign members, for the purpose of advancing international unity of measurements. A conference called by this commission discussed the scientific methods required for assuring the stability of standards, and suggested the creation of an international bureau. For the purpose of carrying out these suggestions, a diplomatic conference was convoked in Paris in 1875, which adopted a treaty on the subject. Under this treaty there was created an international bureau of weights and measures installed at Sevres, near Paris. It is the function of this bureau to preserve the original standards of measurement, and, upon request, to furnish accurate copies to governments and scientific institutions. The bureau is under the supervision of an international committee representing the states who are members of the union. From time to time there is held a general international conference composed of delegates of the treaty states. The conference confines itself to the discussion of scientific methods for perfecting the accurate reproduction of standards of measurement. The international bureau has become an important scientific center for metrological investigations. It is supported by contributions from the treaty states, and by fees received for reproductions of the prototype measures.⁶

Industrial, Literary, and Artistic Property. As a result of long-continued discussion on the part of persons and associations interested in the development of industrial inventions, the French gov-

⁶ Bigourdan, G., *Le système métrique des poids and mesures*. Paris, 1901. Moynier, *op. cit.* 57. Olivart, *op. cit.* II, 477.

ernment, in 1880, issued an invitation for an international conference on the protection of industrial property, to be held at Paris. At a second conference held at the same place in 1883, there was adopted and signed by the representatives of eleven states a convention for the protection of patent rights and trademarks. The purpose of the union thus formed was not the complete unification of the respective laws of the member states, but rather the creation of administrative rules by which the citizens of one state would be permitted without expensive formalities to come under the protection of the patent and trademark laws of the other states. Such an administrative arrangement might, of course, lead the way to a gradual assimilation of the national patent laws themselves, although this would not be its direct object. A central organ of the union, the International Bureau of Industrial Property, was established at Berne. The functions of this office were at first confined entirely to correspondence, investigation, and publication. It was charged to bring together statistics and other useful information, to issue a periodical (*La Propriété industrielle*), and to prepare preliminary studies for the conferences. The suggestion to make it an office for the registration of international patents did not at first find favor. At the second revisionary conference, held at Madrid in 1890, this suggestion was repeated. Though this arrangement was not acceptable to all the treaty states, it was adopted by ten of them, who thus formed a restricted union under the more general convention. Under this system the registration, at the international bureau, of a trademark already registered in one of the treaty states, has the effect of giving this trademark protection in all the other contracting states without any further special registration in any of them. This method of procedure is a great simplification, and it materially reduces the expenses of industrial companies on account of trademarks. The net income of this special service is distributed *pro rata* among the states of the restricted union. This arrangement, by which the international bureau becomes an administrative organ of the treaty states, is admirable for its simplicity. It does not involve any change in the national law, but simply entitles the person or firm registering a trademark to whatever protection is given in the respective treaty state to this form of commercial property. The international union

was strengthened in 1903 by the accession of the German Empire, which, up to that time, had held aloof.

The formation of the union for the protection of industrial property was an encouragement to those persons who desired a similar international protection to be extended to works of art and literature. An international literary and artistic society had been formed in Paris in 1878 for the advancement of the above purpose. At a conference held at Berne in 1883, the association worked out a general project of a convention for the protection of literary and artistic works. Thereupon the Swiss government was prevailed upon to call an official conference for the purpose of adopting a convention of this kind. Three diplomatic conferences were held in three successive years beginning in 1884, which resulted in the formation of an international union for the protection of literary and artistic property. The union also created a bureau (1888) which acts as a central organ of information and publishes a journal (*Le Droit d'auteur*). In 1892 this office was united with the industrial bureau. The associated bureaus are under the control of the Swiss department of foreign affairs. Their expenses are borne by the treaty states in proportion to population. The relations of these bureaus to the governments and national administrations are, of course, not nearly so direct as in the case of the telegraph, the postal, and the railway freight bureaus, nor do they possess any arbitral functions; but their work in bringing together authoritative information upon the patent and copyright laws of the various nations has been of great value to the public and to persons specially interested. Movements for the reform of national legislation have derived their information from these international organs. The bureaus have a very small personnel, and have always stayed well within their modest budget, notwithstanding the volume and real importance of their published work.⁷

Union for the Publication of Customs Tariffs. In 1890 there was created by convention an international bureau for the purpose of the collection and publication of customs tariffs. The bureau is

⁷ *Recueil général de la législation et des traités concernant la propriété industrielle.* Published by the International Bureau, Berne, 1896-7. Frey-Godet, *La Protection internationale des marques industriels.* In *Zeitschrift für Völker-*

situated at Brussels. Its duty is to supply, with the least delay possible, copies of laws and administrative ordinances referring to customs tariffs, and to cause the same to be published in its own periodical (*The International Customs Bulletin*). Forty-one states are parties to this arrangement; they divide among themselves the expenses of the bureau. In 1894 it was attempted, upon the initiative of the Swiss government, to establish a similar office for the publication of international treaties. Sixteen governments were represented at a conference held at Berne, where the project of the Swiss government was discussed. On account of the lack of direct authorization on the part of several delegates, the conference did not take any action, but referred the project to the consideration of the various governments.⁸

International Protection of Labor. The efforts which have been made for the purpose of securing international agreements for the protection of labor are especially instructive. In a peculiar manner, private and state initiative have been combined and intermingled in the co-operation between public officials with private experts to bring about an international understanding. No field of action reveals so clearly the limitations of international arrangements and the difficulties in the way of their achievement, nor, on the other hand, shows so fully the possibilities inherent in them. The government of Switzerland deserves the credit of having made the first attempts to secure an international conference on labor legislation, after the matter had been repeatedly considered by a number of international labor congresses, composed of delegates of labor associations and of other organized bodies. In 1889 the Swiss federal council addressed an invitation to fourteen European powers, requesting them to send delegates to a conference for the purpose of discussing certain definite topics concerning labor legislation. The suggestion was favorably received by the majority of the coun-

recht und Bundesstaatsrecht. I, 329. Soldan, *L'Union intern. pour la protection des œuvres littéraires et artistiques*. 1887. A. Darras. *Du droit des auteurs et des artistes dans les rapports internationaux*. 1887. Olivart, *op. cit.* II, 402. "Paris Copyrights Congress," in *Nation*, 71:226. *Recueil des conventions et traites concernant la propriété littéraire et artistique*. Published by the International Bureau, Berne, 1903.

⁸ Acts of the Conference of Brussels, 1888, and of Berne, 1894, in *Arch. dipl.*

tries addressed, and the federal council consequently decided to send out formal invitations. But at this very time the German Emperor issued two rescripts, in which he pronounced in favor of international action in labor matters. Correspondence followed between Germany and Switzerland, and the smaller country ceded to the German Empire the honor of calling the conference. The latter assembled in Berlin in March, 1890, with a representation of fifteen states. Three committees were appointed to consider (1) work in mines, (2) Sunday rest, (3) work of children, young workmen, and women. Though Switzerland proposed the conclusion of a binding convention and the creation of a central bureau, the conference did not favor the taking of such definite measures at that time. The only result of its work was the passage of resolutions embodying the opinion of the delegates on certain principles to be followed in labor legislation.

The conference thus having failed to produce tangible results in the form of a treaty, the propaganda for international labor protection was taken up with redoubled energy by private individuals and associations. In 1897 two labor legislation congresses were held. The congress at Zurich was composed of the representatives of labor organizations. Although many opposing views were here represented, the delegates nevertheless found it possible to unite upon a definite program of labor legislation. The congress which met in Brussels in the same year (International Congress of Labor Legislation) was composed largely of publicists and economists. It confined itself entirely to discussion, not even passing resolutions. After the session, however, there was appointed informally a committee of three members for the purpose of finding means to carry on the work begun in the congress. The committee made certain arrangements with the Belgian government for the publication of an *Annuaire de la législation du travail*, but the political conditions in Belgium were not favorable to a further pursuance of the purposes of this group of men. Other national committees were, however, created, and the French committee eventually arranged for a conference which was held at Paris during the exposition of 1900. This congress occupied itself with the question of a permanent organization. It was decided to form an international association,

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open to all who believed in protective labor legislation. The association was to be composed of national sections, each with its separate organization and autonomy. The governing board was to be a commission composed of two delegates from each section, together with the representatives of governments which desired to take part in the enterprise. An international labor office was established, whose mission it is to publish, in French, German, and English, a periodical report on labor legislation in all countries; to furnish the members of the association information on labor laws; to assist in the study of the legislative protection of labor, as well as in the creation of a systematic body of international labor statistics. The labor office is located at Basel, where it began work in May, 1901. In September of the same year the first general assembly of the association was held at Basel. It was composed of delegates representing the national sections as well as four governments. This assembly expressed the opinion that while the association itself might carry on an active propaganda for labor legislation, the international bureau should confine itself to an objective and impartial study of labor legislation for the purpose of furnishing an absolutely reliable basis of facts and statistics. As the first questions for discussion and eventual action the assembly selected, first, industrial night work of women; and, second, the regulation of unhealthy industries, especially those using white lead and white phosphorus.

The second general assembly was held at Cologne in 1902. On this occasion seven national sections and eight governments were represented. The assembly considered the organization and the finances of the international office as well as the two questions submitted by the previous assembly. The international commission was instructed to take steps to induce the various governments to consider the suppression of these industrial dangers. The commission, at its subsequent meeting at Basel, decided to appeal to the Swiss federal council in order that an international conference might be called to frame a treaty on these matters. Early in 1905 invitations were sent out, and in May the official conference met at Berne. Over fifty delegates were present, representing all the governments of Europe, with the exception of Russia, Greece, Roumania, and Servia. The conference took up the discussion of the

two questions which had been formulated and prepared by the assemblies of the international association. Although the sessions occupied only eight days, the discussions were earnest, and many different points of view were brought out. The absence of Japan interposed special obstacles to the adoption of a convention on the use of white phosphorus, a material extensively employed in the Japanese match industry. The convention which was finally adopted on this point provided that after January 1, 1911, the manufacture and sale of matches containing white phosphorus was to be forbidden. The Japanese government was to be invited to join in this treaty before December 31, 1907, and the validity of the treaty was made dependent upon its acceptance by all the states represented and by Japan. Eleven out of the fifteen states voted in favor of this proposal. The conference also adopted a protocol regulating the hours of night work for women. These projects were transformed into definite conventions by a diplomatic conference which met in December, 1906. They have not as yet been accepted by all the states represented.

The extreme caution with which the governments have proceeded in this matter is a characteristic mark of the jealousy which states feel in behalf of their legislative independence in such important matters as labor legislation. In the railway and telegraph service a unified administrative procedure for international traffic was forced upon the various governments by the circumstances of the case. That there is a great need for international regulation of labor laws is apparent from the interest which this subject has aroused. National advance in labor reform would, in fact, be checkmated were it not to be seconded by international agreements. Yet the governments have been very reluctant to commit themselves to any definite policy of uniformity in this matter. The existing union has therefore remained semi-private in its nature, for its main constituent elements are the national sections. The international labor office may also be called a semi-private institution, though its work has been assisted in every way by the various public administrations which deal with labor affairs. The expenses of the office are borne partly by the contributions of national sections, but more largely by subscriptions of governments, Switzerland itself leading with a subscription of ten thousand francs a year.

In this connection we may also note the provisions of the Franco-Italian treaty of April 7, 1904. This treaty constitutes a very important attempt to have the privileges of a national labor legislation extended to laborers who are sent in from another state. The convention refers especially to the gratuitous transfer of the savings accounts of laborers from one country to another, the admission of foreign laborers to the benefits of national labor insurance, and the extension to them of the general rules of protection afforded by the national law.⁹

The Sugar Convention. For over forty years past, negotiations have from time to time been carried on among the powers for the purpose of putting restraints upon the policy of individual governments, by which they attempt to modify the commerce and production of sugar by means of a bounty system. Earlier treaties, such as that of 1864 and of 1877, proved inadequate to accomplish this purpose, because of the lack of compulsory provisions and the consequent failure of some of the contracting nations fully to live up to the agreement. After long-continued negotiations and a succession of conferences, a convention was finally concluded in Brussels in March, 1902, by which a number of European states formed a union for the purpose of doing away with sugar bounties. This union included at the time of its beginning ten states. A permanent organization is provided for in article VII of the treaty, which creates a permanent commission charged with supervising the execution of the agreement. This commission is composed of delegates of the contracting states. Its seat is at Brussels. The functions of the commission are as follows: (a) to determine whether in the contracting states there is accorded any direct or indirect bounty on the production or exportation of sugar; (b) to determine whether

⁹ A full bibliography is given by F. Dochow in *Zeitschrift für Internationales Privat-und öffentliches Recht*. Leipzig, 1906. Francke, E., *Der internat. Arbeiterschutz*. Dresden, 1903. Account of the Berne Conference with process-verbal, in *Arch. dipl.*, 1905, vol. III, p. 271. Bulletin de l'Office international du travail. Since 1900. Crick, D., *La Législation internationale du travail*. Rev. d. dr. internat., 1905, p. 432. Armand-Hahn, J. P., in *Annales des sciences politiques*. 20:156. Jay, R., *La Protection légale des travailleurs*. Paris, 1904. *Schriften der internationalen Vereinigung für gesetzlichen Arbeiterschutz*. Jena, 1901-6. Bauer, "International Labor Office." *Economic Journal*, 1903. Raynaud, B., *Droit international ouvrier*. Paris, 1906.

the contracting states, which are not exporters, continue in that special condition; (c) to determine the existence of bounties in non-signatory states; (d) to give advisory decisions on questions in controversy; (e) to give due form to requests of admission to the union on the part of states which are not yet members of the union.

In general, the duties of the commission are confined to determining the existence of facts. On questions submitted to it, it will make a report addressed to the Belgian government, to be communicated to the contracting states. But certain determinations of the commission have a direct validity, and form the basis of contingent treaty obligations on the part of the contracting states. This is the case with reference to the matters mentioned under "b" and "c" above. As soon as the commission shall determine that the states of Spain, Italy, and Sweden have begun to export sugar, these states, under the agreement, must conform their legislation to the dispositions of the convention. As soon as the commission shall ascertain the existence of bounties in non-signatory states, the treaty powers are bound to levy a certain duty upon sugar imported from such sources. These determinations are made by a majority vote of the commission, each state being entitled to one vote, and they go into effect within two months of their date. An appeal, to be considered, must be lodged within eight days after the notification. It will then be decided within a month.

The commission is assisted by a permanent bureau located at Brussels, upon which is imposed the function of collecting, arranging, and publishing every kind of information and statistics relating to sugar legislation throughout the world. The expenses of the bureau and of the commission are borne by the contracting states, who also pay individually the expenses of their delegates. It is to be noted that these organs of the union do not correspond directly with the contracting states. The communications are all made through the Belgian government, which thus becomes the diplomatic agent of the union. Even information on laws, decrees, and regulations concerning sugar, and statistical data, are not communicated directly to the commission, but through the Belgian government as an intermediary. All reports of the commission are likewise communicated through the Belgian government, which also has the right

of calling new conferences. The sugar commission is the only international organ which has a right, through its determinations and decisions, to cause a direct modification of the laws existing in the individual treaty states, within the dispositions of the convention. Though not given direct legislative power, it makes determinations of fact upon which changes in the laws of the individual states become obligatory under the treaty. Its function may be compared to that intrusted to the President of the United States, in the reciprocity provisions of the McKinley and Dingley tariff laws.¹⁰

Agriculture. Like other economic interests, those of agriculture extend in their relations beyond the political boundaries of states. The prosperity of the farmers of a nation is determined to a large extent by the conditions, legal and economic, in markets beyond the national boundary. Being more dispersed than the representatives of other, commercial or industrial, pursuits, agricultural producers have been less successful in uniting for a defense of their common interests. Yet several private associations for the unification of various agricultural interests throughout the world were formed toward the end of the nineteenth century. A general international congress of agriculture has assembled periodically. It is composed of national sections and has for its organ a permanent international commission. Moreover, special organizations were founded to develop international relations among special groups of producers. Thus there was created an international statistical union of sugar production, and an international congress of cotton producers and manufacturers. The latter decided on a permanent executive organization at its meeting in Zurich, in 1904. The cotton congress, held the year after the international institute of agriculture (*v. infra*) had been created, expressed its sympathy with that undertaking, and the hope that it might soon include in its studies and operations matters relating to cotton culture. A German scientist, Dr. Ruhland, has organized at Freiburg an international office for the observation of grain prices and markets, which has done valuable work in pro-

¹⁰ Text of the Treaty of 1902 in "Staatsarchiv," 66:267. Martino, G., "The Brussels Sugar Conference," *Ec. Journ.*, 1904. Taylor, B., "Sugar and the Convention," *Fortnightly*, 77:636. Lough, T. H., "The Sugar Convention of Brussels," *Contemp.*, 83:75.

viding accurate information on the supply and prices of grain, thereby enabling producers to take intelligent advantage of the conditions of the world's market.

These various tentative efforts and organizations with many others not here mentioned indicate that the time was ripe for the creation of a more general union for the advancement of agricultural interests. The official initiative in this matter was taken by King Victor Emmanuel III, of Italy, to whom the idea of an international institute of agriculture had been suggested by Mr. David Lubin, an American. The king, on January 24, 1905, addressed to the president of the Italian council of ministers a letter in which he outlined the objects and purposes of such an institution, in the following language:

Les classes agricoles, généralement les plus nombreuses, ont partout une grande influence sur le sort des nations, mais, vivant sans aucun lien, elles ne peuvent concourir efficacement ni à l'amélioration et à la distribution des diverses cultures selon les exigences de la consommation, ni à la protection de leurs intérêts sur les marchés qui, pour les produits les plus importants du sol, deviennent de plus en plus universels.

Un institut international pourrait donc être d'une grande utilité, si, dégagé de tout but politique, il se proposait d'étudier les conditions de l'agriculture dans les différents pays du monde, signalant périodiquement la quantité et la qualité des récoltes, de façon que la production pût en être facilitée, le commerce moins coûteux, plus expéditif, et la fixation des prix plus convenable. Cet Institut, marchant d'accord avec les divers bureaux nationaux déjà créés à cet effet, fournirait aussi des données précises sur les conditions de la main-d'œuvre agricole dans tous les lieux, de manière à être pour les émigrants un guide utile et sûr; il prendrait des accords pour la défense commune contre ces maladies des plantes et du bétail que la défense partielle ne réussit pas à étouffer; il exercerait enfin une action bienfaisante sur le développement de la co-opération rurale, des assurances et du crédit agraire.

On the basis of this royal initiative, the Italian foreign office instructed its diplomatic agents to attempt to secure the co-operation of the powers for the purpose of creating an international institute. These instructions call attention to the disadvantages from which farmers now suffer through their lack of union which makes them a prey to speculation and to commercial and railway syndicates. But the instructions especially emphasize the support which the movement for international peace would receive through a development

of the common interests of the agricultural class. It is therefore suggested that there be formed an international institute composed of the delegates of various governments and of national associations of agriculture. The purpose of such an institute would include the organization of agricultural exchanges and labor offices; the organization of rural co-operation in sales, purchases, credit, and insurance; the defense against syndicates of intermediaries, and the preparatory study of legislative and administrative problems. Through the work of the institute the governments would be enabled to act in unison upon the most reliable information. In order that these matters might be discussed, the Italian government extended an invitation to the powers to send delegates to a conference to meet at Rome. In preparation for this conference, the ministries of foreign affairs and agriculture in Italy worked out a definite program, which embodied the suggestions made before.

In the conference which met on May 28, 1905, thirty-eight European, American, Asiatic and African governments were represented by official delegates. Although some of the most powerful states maintained an attitude of reserve, the general idea of an international institute of agriculture was received with favor. Opinions were, however, divided on the form to be given the institute. The thought of the Italian government evidently had been that there should be two component elements, possibly organized in two separate houses, one comprising the official delegates of the government, the other the representatives of agricultural associations. Thus only, it was believed, could the agricultural interests throughout the world become truly unified. The conference, however, confined its action to the establishment of an institution composed solely of the delegates of governments, — diplomats or agricultural experts. The International Institute of Agriculture, as organized by the conference, takes the following form: It is a public institution, consisting of a general assembly and a permanent commission, in both of which each treaty power is represented. The number of votes attributed to any state in the general assembly is fixed according to the size of its contribution. The general assembly controls the work of the institute. It considers projects prepared by the permanent commission, fixes the budget, and makes suggestions to the contracting

governments, with respect to modifications of the organization. The quorum is fixed at two-thirds of all the votes of the contracting states. The permanent commission carries out the directions of the assembly, and prepares projects for consideration by the latter. It is composed of one representative from each of the states, although it is permitted that one delegate may represent several governments.

The functions of the institute are as follows: (a) to collect, study, and publish statistical, technical, and economic information relative to agricultural and animal husbandry, agricultural markets, and prices; (b) to communicate to governments interested the above information; (c) to investigate the payment of rural labor; (d) to give notice of new plant diseases which may have appeared in any part of the world, indicating the extent of territory affected, the course of the malady, and, if possible, efficacious remedies; (e) to study questions relative to agricultural co-operation, insurance, and credit; (f) to present for the approbation of governments measures for the protection of the common interests of agriculturalists and for the betterment of their condition; taking account of all means of information, such as resolutions of international and other agricultural congresses, agricultural societies, academies, scientific bodies, etc.

The states belonging to the institute are divided into five groups, each state being free to choose for itself to which group it will belong. The first group has five votes and contributes sixteen units to the income of the institute; the second group has four votes and contributes eight units; and so on down to the fifth, which has one vote and contributes one unit. The unit is not to exceed 2,500 francs a year. The King of Italy supported the foundation of the institute by making over to it the revenues of certain valuable crown domains.

The organization determined on by the diplomatic conference at Rome was far from meeting the desires and aspirations of the men who were most interested in the movement for an international union of agriculture. Not only is the institute a purely governmental institution, but its functions are practically confined to the collection of information and the suggestion of projects for treaties and legislative measures. Yet it could hardly be expected that the governments would immediately consent to the establishment of an

organ with direct administrative functions such as for instance an international co-operative union of agricultural credit. On the basis of the organization as effected, it will be possible to centralize efforts in behalf of the agricultural interests and to secure a gradual amelioration of agricultural conditions. The institute, as its organic law indicates, will hold itself ready to co-operate with national and international organizations representing private initiative, such as the international congress of agriculture, mentioned above. In Italy there was organized in 1905 a special office for the representation of agricultural societies and co-operative organizations, which is to mediate between the latter and the international institute.

Several matters, connected with agriculture, which have heretofore been regulated by separate treaties, will now probably be drawn within the field of action of the agricultural institute. In 1878, there was formed in Berne a union comprising eleven European states, for preventing the introduction and propagation of phylloxera. In March, 1902, a convention was concluded at Paris for the protection of useful birds; subsequently ratified by eleven states. The treaty governments engage themselves to propose to their respective legislatures measures for the protection of birds which are useful in agriculture. In this connection we may also mention the union for the protection of large African game, concluded in London, May 19, 1900, among the powers which have colonies in Central Africa.¹¹

Insurance. Though there has not as yet been created in the interests of insurance an international administrative organization, yet a number of governments have regularly participated in the meetings of international associations dealing with insurance problems. Most prominent among these is the International Congress of Actuarial Science. Not only have the meetings of this congress usually been held under government patronage, and under the presidency of some important statesman (in 1903, Secretary Cortelyou in New York), but many governments have been represented by official dele-

¹¹ Dalla Volta, R., "The International Institute of Agriculture," *Rev. d'ec. pol.*, 19:597. Gidel, "L'Inst. agricole internat.," *Ann. Sc. pol.*, 20:630. Pantaleoni, M. In the *Giornale degli Economisti*, Feb. 1905. Papafava, F., *Ibid.*, Sept., 1905. Henry, A., "L'organisation du commerce des blés," Brussels, 1900. Luzzatti, L., "The International Institute of Agriculture," *North Am. Rev.*, 182:651. Bellini, A., *L'Istituto Internaz. d'agric.* Turin, 1906.

gates, and the deliberations of the congress have dealt to a large extent with administrative and legal, as distinct from technical and mathematical, subjects. The congress of 1906 was held in Berlin in conjunction with the Fourth International Congress of Insurance Medicine. Sixteen governments were represented by official delegates, and five of the thirteen topics of discussion dealt entirely with administrative and legal questions. The congress has an official organ in the Permanent Commission on Insurance (*Comité permanent*) at Brussels. Aside from the governments, national actuarial societies and similar associations are represented in its organization.

The international congress of protection against fire which is a more purely private organization, resolved in London in 1903 to establish experiment stations, an international expert commission, and an international statistical bureau. International congresses of labor insurance have been held repeatedly (the eighth congress met at Rome in 1906) and have received financial assistance from various European states.¹²

III. SANITATION AND PRISON REFORM

The International Prison Congress. Congresses for the purpose of the discussion of penitentiary administration and reform have been held at irregular intervals from 1846 on. At the congress of 1872, under the leadership of the United States, steps were taken to secure a permanent organization. Since 1880, congresses have been held every five years, the place of the next meeting being Washington (1910). At the congress at Buda-Pest in 1905, twenty-eight nations were represented by delegates. The executive work of preparing for the congresses is performed by the International Penitentiary Commission composed of one delegate from each country. The commission meets regularly every two years, and is composed of four sections, among whom the consideration of prison administration, penal law, and prevention of crime is distributed. The secretariate of the commission is situated at Berne. Some time previous to the meeting of the congress, a series of questions prepared by experts

¹² Emminghaus, in *Zeitschrift f. d. Versicherungs-Wissenschaft*. 7:9. Reports, Memoirs, and Proceedings of the Fifth International Congress of Actuaries. Berlin, 1906.

are sent out to the various countries represented. They are submitted to experts, carefully studied, and reports upon them returned to the secretariate. All these reports are then edited and published in French to be distributed among all the delegates appointed to the congress, in time to enable them to give these matters a careful study. In this manner the discussions avoid all preliminary misunderstandings as to definitions and points at issue, and the meetings of the congress are usually very fruitful in the formation of definite opinions on matters connected with practical prison administration. The congress and the commission have no power to bind the respective governments by treaty; their purpose is primarily the exchange of expert opinion and knowledge, and the development of the science of penitentiary administration.¹³

International Sanitation. International defensive action against invasion by epidemics was first urged by the French government, which in 1851, called a sanitary conference to meet in Paris; this was followed by a second meeting in 1859. The terrible epidemic of cholera of 1865 caused the holding of a third conference at Constantinople. Other conferences have followed at short intervals. Although from the first these conferences had a diplomatic character in that they were attended by the representatives of governments, diplomatic action was not taken until 1892. Before this date, the conferences were primarily scientific in character, confining themselves to discussions and resolutions, rather than elaborating treaties. Ultimately, however, more formal action was taken and the conference of Venice in 1892 framed the first general treaty on the subject of protection against cholera. Every conference since then has added to the diplomatic work, that of Venice in 1897 and that of Paris in 1903 being especially important.

At the latter conference it was voted to establish an international sanitary office to be situated at Paris. Such a bureau had first been suggested at the International Congress of Hygiene at Brussels in 1897. At the Paris Sanitary Conference the president of the French

¹³ Bulletin de la Commission pénitentiaire internationale, Brussels and Berne. Jaspar, H., In Rev. de Dr. Internat., 1901, p. 448. National Prison Association, Proceedings 1905, p. 227. Charities, vol. XV, 126. "Les Congrès pénitentiaires internat.," Rev. Pénit., 1905, p. 653.

delegation introduced the subject by calling for the creation of a *union de santé incarnée dans une autorité internationale fortement constituée*. The functions bestowed upon the bureau at this time are, however, not executive, but only informational. The office is to collect information on the progress of infectious diseases, being assisted by the sanitary authorities of the treaty states. The results of the work of the bureau are to be communicated to the various governments and published. The establishment of the bureau was supported by all powers represented, but was accepted with certain reservations by Austria, Great Britain, and Germany.

The execution of the treaties of the Sanitary Union, with respect to prophylactic measures to be taken in Turkey and Egypt, is supervised by two commissions, the Sanitary Councils of Constantinople and of Alexandria. The *Conseil supérieur de santé* of Constantinople was created by treaty between the Sultan and the maritime powers having relations with Turkey, as early as 1839. It was natural that the functions of surveillance created by the treaty of Venice in 1892 and by later treaties should be entrusted to this organ. The council is composed of seventeen delegates, four being appointed by Turkey, the others by the foreign treaty powers. Decisions of the council are taken by majority vote, and are directly executory. The Turkish minister of foreign affairs acts as president of the council and the representation of the foreign powers is arranged through their respective legations at Constantinople. The council supervises the quarantine service at Turkish ports on the Persian Gulf and on the Red Sea as well as along the Persian and Russian boundaries. The expenses of the council are met by fees imposed for quarantine services, which are in turn regulated by a "mixed commission on the sanitary tariff," composed of representatives of the various powers. The Turkish government also contributes to the expenses of the council.

The *Conseil sanitaire, maritime, et quarantenaire d'Egypte* at Alexandria was created in 1881. It is composed of the representatives of fourteen treaty powers and two representatives of Egypt. The presidency is accorded to the representative of Great Britain. The council has regular monthly meetings and controls the Egyptian

quarantine stations on the Red Sea, the Suez Canal, and the mouth of the Nile. A similar sanitary council exists at Tangier. It was created in 1840 and has also been brought in relation to the general sanitary union. The conventions framed by the various sanitary conferences control the treatment of suspected ships and passengers from countries subject to epidemics, in all the ports of the treaty powers. The conclusion of general treaties on this matter was for a long time resisted by Great Britain, because of fears in behalf of her shipping interests. The continued danger of infection from Oriental countries, however, finally forced the European nations to unite in self-defense. The sanitary conferences, while fitted out with diplomatic attributes, are still largely concerned with questions of scientific character. The provisions of their treaties must frequently be modified in accordance with the latest determinations of science with respect to the period of incubation and the most efficient means for preventing the transmission of disease.

The International Congress of Hygiene and Demography has a purely scientific character. It is composed of the official representatives of most of the civilized countries, together with delegates of scientific bodies and of local councils of public health. The congress has a permanent commission with offices at Brussels. Another similar organization, in which also governments officially interest themselves, is the International Congress of School Hygiene.¹⁴

The Geneva Convention. The care of the wounded during wars has become the subject of a special international agreement, the Geneva Convention of 1864. This regulates the treatment of disabled soldiers and neutralizes the sanitary and hospital services during military operations. This convention made possible the work of the Red Cross Societies, which have been established in practically all civilized countries. These associations are organized on a private basis, though their work is essentially of a public nature, for which reason they must necessarily be in close touch with the administra-

¹⁴ Text of the Treaty of Venice, 1897, in *Staats-Archiv*, 61:261. The Conference of Paris, 1903, in *Rev. générale*, 11:199. Monod, H., in *Rev. d'administration*, March, 1904. Rapmund, O., *Das öffentliche Gesundheitswesen*, Leipzig, 1901, p. 126. 8. Congress Internat. de Hygiène et de Démographie, Buda-Pest, 1895. Huot, in the *Rev. intern. de dr. Maritime*, 19:803. *Procès-verbaux*, Paris Conference, 1903. Paris, 1904.

tion of military affairs. The societies form a universal union, which has its administrative offices at Geneva, and which holds periodical conventions. Repeated attempts which have been made to amend the Geneva Convention have thus far remained unsuccessful. The last conference for this purpose was held in 1906; the final outcome of its work is still in the hands of the various foreign offices.¹⁵

IV. POLICE POWERS

Fisheries Police. The fishing industry in the North Sea, being carried on by numerous fishermen belonging to various nationalities, has required international legislation and protection. A treaty was concluded in 1882 between the six powers most directly interested. Under this treaty any commissioned ship of a signatory power may in certain enumerated cases intervene and arrest any fishing vessel belonging to a subject of a treaty power. The delicts for which such an arrest may be made are enumerated in the treaty and the delinquent vessel must be delivered up to the authorities of its own country. This arrangement is supplemented by the convention of November 16, 1887, concluded at The Hague among the same powers, with the exception of France. Under this convention the surveillance and control of floating *cabarets* or liquor shops is provided for. The policing is carried on by the commissioned ships of the treaty powers, which have the same rights of arrest in this matter as they were given under the treaty of 1882.¹⁶

Protection of Submarine Cables. The international status of submarine telegraphs led to much discussion when these instruments of communication were first put into use. In 1869, the government of the United States suggested the holding of a conference for working out a treaty project on the neutralization and protection of cables. The Franco-Prussian War caused the postponement of such action, although there was continued diplomatic and scientific discussion of the international law aspects of marine telegraphy. In

¹⁵ Bulletin international des sociétés de la Croix Rouge. Geneva. Moynier, Notions essentielles sur la Croix Rouge. Geneva, 1896. Meurer, in Zeitschr. f. Völkerr. I, 521.

¹⁶ Treaty of May 6, 1882, and of Nov. 16, 1887, in Arch. dipl. Père de Cardaillac de St. Paul, Étude de droit international sur la pêche. Toulouse, 1903.

1879 the Institute of International Law took up this matter, and came to the conclusion that the first object to be achieved was to protect submarine cables against wanton or careless destruction, by means of an international agreement for the arrest of delinquents on the high seas. In 1881, on the basis of a resolution of the International Congress of Electricians, the French government issued invitations for a diplomatic conference, which met in Paris during the subsequent year. Thirty-three states, as well as the International Telegraph Bureau of Berne, were represented, either by diplomatic or expert delegates. The delegates of the United States, the power which had originally taken the initiative, declined to take an active part in the proceedings, pleading lack of instructions from their government. The result of the deliberations of this conference was the drafting of a convention which was later ratified by the diplomatic representatives of the powers at Paris (March 14, 1884). Under this treaty certain precautions for the protection of cables are made obligatory upon fishermen and navigators. The commissioned ships of any signatory power may arrest ships suspected of having wilfully or negligently injured cables. The arrest is made for the purpose of ascertaining from the ship's papers all necessary data with respect to it. An authentic written minute (*procès-verbal*) is made out on the basis of the facts thus ascertained and the injuries observed. This document has legal force before the national tribunals of the delinquent, to which jurisdiction for the trial of such cases is reserved.¹⁷

African Slave Trade and Liquor Traffic. Agreements for the suppression of the slave trade were made between Great Britain and France in the years 1833 and 1841. In the latter treaty, some additional states joined. The congress of Berlin in 1885, took up the question again, and determined in principle upon the more complete international organization of the preventive system. The Brussels conference of 1890 finally regulated the matter through a convention or General Act in which both slave trade and African slavery itself were made subject to strict international regulation. An office was established at Zanzibar (*Bureau international maritime de la traite*)

¹⁷ Landois, *Völkerrechtl. Schutz d. submarinen Telegraphenkabel*. Greifswald, 1894. Renault, L. On protection of cables in *Rev. de dr. int.* 15:17.

for the purpose of superintending the enforcement of the General Act. The five powers which primarily assumed the preventative operations on sea are represented in this bureau. A second bureau was established at Brussels for the purpose of collecting information and publishing documents and statistics with respect to the slave trade. Seventeen states are members of this union. The Brussels General Act of 1890 also regulates the sale of liquors in the central belt of Africa (between twenty degrees north and twenty-two degrees south). In regions where the natives have not yet become accustomed to the use of liquors, the traffic is entirely forbidden. For other parts, a high minimum excise duty is fixed by the treaty. The bureau at Brussels is to act as an intermediary between the treaty powers, for the exchange of information concerning the liquor traffic in their respective African possessions.¹⁸

The Repression of White Slave Trade. The nefarious traffic known as the white slave trade has for a considerable time operated on an international basis. The persons engaged in it have received protection from the fact that their transactions were not confined to one single national territory but that acts apparently innocent and legitimate were followed by a consummation in another state which rendered the entirety of the act criminal. Without international agreement as to the responsibility in such cases, it would often be impossible to punish guilty persons because the acts committed in any one particular state might not amount to a completed crime. It was, moreover, necessary that the police administrations of the different states should support the efforts of each other by promptly giving information and in other ways, so that the execution of criminal designs might be frustrated. The matter of coming to an understanding was first taken up by private international congresses. The principal one of these organizations is the International Union for the Repression of the White Slave Trade, which was founded in London in 1899 and has its central office in that city. The successive congresses of this union have worked out definite principles and methods for the purpose of preventing the traffic in question. Through its initiative, the French government was prevailed upon

¹⁸ Brussels General Act in *Arch. dipl.* 35:206. Documents relatifs à la repression de la traite. Brussels, 1903.

to call a conference of the powers, which met in Paris in July, 1902. Fifteen states were represented, including Brazil on the part of America. The conference elaborated projects for a convention and for an administrative arrangement. The former includes such modifications of the principles of criminal law as would be necessary to make the suppression of the traffic effective. The latter provides for administrative arrangements and methods which can be instituted without legislative action by mere administrative ordinances in the various states. A diplomatic conference, assembled in Paris in May, 1904, ratified the administrative arrangement. The convention has not as yet been adopted by the powers. The administrative arrangement provides that each treaty government is to create a special bureau which is to collect all specific information about attempts to engage women for immoral purposes in foreign countries. Such bureau is to have the right of immediate communication with the similar bureaus in other states. The governments are to institute a special service of surveillance in railway stations and ports for the purpose of discovering attempts to carry on illegal traffic. In cases where mere suspicion exists, such suspicion shall nevertheless be communicated to the authorities at the point of destination of the suspected persons. The repatriation of victims of the traffic is also provided for. The French government is made the agent of the union for the purposes of negotiating by diplomatic means for the admission of new members.¹⁹

V. SCIENTIFIC PURPOSES

Among the commissions and bureaus which have already been reviewed above, there are a number whose functions may be called scientific. Bureaus like that of the industrial property union and the sanitary union have the duty of collecting reliable information

¹⁹ Int. Conf. for the Repr. of White Slavery, 1902, in *Arch. dipl.* 77:154-263. Appleton, P. *La traite des blanches*. Paris, 1903. Reports of the International Congress for the Repression of White Slave Trade. (London, 1899; Frankfurt, 1903; Paris, 1906.) Renault, L. "La Traite des Blanches," in *Rev. gén.*, 9:497. Rehm, in *Zeitschr. für Völkerr. und Bundesstaatsr.*, 1:446. Mayr, G. v. on the Paris congress on white slavery, 1906, in *Beilage zur Allgemeinen Zeitung*, Munich, Feb. 5-6, 1907.

and arranging it in a scientific manner. The functions of the metric bureau at Sevres are of a strictly scientific nature. But in all these cases, and in the others reviewed, the information is gathered for the purpose of forming the basis of definite action by the governments who are members of the respective unions. There are in addition to these associations and unions a few whose purpose is purely informational and scientific. We cannot, of course, in this place deal with the numerous scientific associations of international extent composed of private persons and not connected with governments through representation or financial support.

The International Geodetic Association. Under the initiative of the Prussian government, a conference was convened in 1864 for the purpose of forming an association through which the geodetic work carried on by the various governments could be compared and rendered more efficient and a harmonization of effort achieved. Fourteen states were represented at this conference. It created a permanent organization, composed of a general conference which meets every three years, a permanent commission, and a central bureau. The latter was located at Potsdam and placed under direction of the Prussian institute of geodesy. The original purpose of the association was to consider the geodetic researches with respect to central Europe. The scope of this scientific purpose was subsequently expanded so as to embrace all of Europe, and then the entire globe; the ultimate purpose of the association being the absolute determination of the form of the earth. The organization of the union was modified in 1886 by giving the international bureau an independent budget made up of contributions of the member states according to population. The control of the Prussian government over the bureau was rendered less direct by this measure, although the connection with the Prussian institute was maintained. At the present time the association has a membership of twenty states. In the words of a delegate to the last conference,

The association does not fix the methods of observation or computation in any country; it controls only the methods used in its own central bureau, and in the field work paid for from the association funds. But by virtue of the active interchange of ideas, the association undoubtedly exerts a strong influence in making the methods used in various countries more uniform and progressive than they otherwise would be.

The average amount of the budget for the past few years has been \$19,000 per annum.

The Permanent Council for the Exploration of the Sea, which is located at Copenhagen, is supported by international co-operation and pecuniary contributions on the part of governments.

In order to make the scientific and statistical information published by any nation readily accessible to others, a treaty was framed in Brussels in 1886 among eight European and American powers for the purpose of the direct official interchange of public documents and scientific publications. An international exchange service for the publications of learned societies and universities is maintained and conducted by the Smithsonian Institute, at Washington. The International Institute of Statistics which was founded in 1885 is essentially a private association, but as nearly all members are officials or councillors of public statistical bureaus, and as it concerns itself chiefly with governmental statistics, its work has a semi-public character. In its biennial sessions government officials have taken a leading part, some prominent minister of state usually acting as honorary president.²⁰

VI. INTERNATIONAL COMMISSIONS AND UNIONS FOR SPECIAL AND LOCAL PURPOSES

Common action on the part of a number of states to protect specific interests is becoming more and more frequent. In order to carry out the provisions of treaties or to make an investigation, temporary commissions have often been created, whose duties are confined to the accomplishment of a certain, specific task. Of this nature were the commissions appointed to elaborate the provisions of the Vienna treaty of 1815, dealing with navigation. Separate commissions were appointed to prepare regulations for the Vistula, the Elbe, the Rhine, and the Ems. But though it would be interesting to study the organization and work of these temporary bodies,

²⁰ Tittmann and Hayford, "Conference of the Geodetic Association," *Science*, Dec. 7, 1906. Publications of the International Council for the Exploration of the Sea, Copenhagen, since 1903. On the International Conference and Council for Explor. of the Sea, *Geogr. Journ.* 20:316, and *Scott. Geogr. Mag.* 16:299. Bulletin of the Internat. Statistical Institute, various places since 1886. Treaty of March 15, 1886, in *Arch. dipl.*

we shall have to content ourselves with a very brief review of those international commissions for special or local purposes, which have a more permanent duration. An interesting attempt to regulate the jurisdiction over boundary rivers through the institution of an international tribunal and the determination of its relations to the national courts is contained in the convention relative to the navigation of the Rhine, which was concluded on October 17, 1868, between six riparian states. It provided for an international tribunal of Rhine navigation, in which all the treaty states were represented.

The interest which a number of central European states have in the navigation of the Danube has led to the conclusion of a series of treaties and conventions upon this matter, beginning with the treaty of Paris in 1856. By this treaty there was created a European Danube commission, which was charged to plan and carry out important works of improving the navigation of the lower Danube. Its duration, originally limited to two years — a strangely inadequate period — was subsequently extended, until finally by the treaty of London in 1883, its powers were prolonged for twenty-one years and for periods of three years thereafter, subject to denunciation by any of the treaty powers. The commission is composed of representatives of the ten treaty states; its permanent offices are at Galatz. Its resources are supplied by an equal tax upon the shipping of the lower Danube, and it is guaranteed complete independence from undue interference on the part of any riparian state. Very important and useful works have already been executed under its superintendence. The regulation of the methods of navigation and the general river police have, by the treaty of London, been placed in the hands of a "Mixed Commission of the Danube," composed of representatives of the riparian states along the lower Danube together with a member of the European Danube commission. The duration of this second commission has been made co-extensive with that of the European commission.²¹

The Peking peace protocol of September 7, 1901, provides for the improvement of the navigation of two Chinese rivers under the superintendence of two international commissions.²²

²¹ Orban, P. *Étude de droit fluvial international*. Paris, 1896. Arntz, *Régime international du Danube*. Twiss, T. *The Law of Nations*. I, 150-2.

²² *Règlement pour l'amélioration du Whang-pou*, in *Arch. dipl.* 81:28.

By the general act of the Berlin conference (1885) there was instituted an international commission of the Congo. The duty of this commission is to superintend the execution of the treaty provisions in favor of the equal rights of navigation in the Congo basin. It is provided by the act that the commission is to be composed of one representative of each treaty power, to be independent of the riparian governments, and to have the usual diplomatic privileges of inviolability. This commission has, however, not as yet become active. A similar commission was instituted by the treaty of Constantinople, of 1888, for the purpose of supervising and enforcing the observance of the neutrality of the Suez Canal; it is made up of the consuls of the treaty powers in Egypt.

Another instance of international co-operation is found in the union for the purpose of maintaining a lighthouse at Cape Spartel, in Morocco. Eleven powers are members to this agreement, which is carried out under the superintendence of the consular corps at Tangier. As a result of the treaty of Algeciras (1906), international supervision over Moroccan affairs has been very much extended. We may note especially the international control of the police, and the international bank of Morocco.

In case of serious disorganization in the financial system of the state, joint international action for the purpose of reform has been frequently resorted to. The Egyptian commission for financial affairs (*Caisse de la dette*), which was instituted by treaty in 1880, is composed of representatives of the principal creditor nations. The amortization and conversion of the Egyptian debt is under its control, and its consent is necessary to enable the Egyptian government to incur any expenditures not authorized under the original treaty. A similar institution for Turkish finance has existed since 1878. In 1897 there was created an international financial commission for the control of Greek finances. The Macedonian financial *règlement* of 1906 also provides for an international fiscal commission. This is to be composed of delegates of Germany, France, Great Britain, and Italy, of the civil agents of Russia and of Austro-Hungary, and of the Turkish inspector-general of finance. The commission is to superintend the regular collection of the taxes, and its assent is necessary to the validity of the Macedonian budget. The commission has

the right to nominate for each vilayet an inspector to superintend the fiscal agents employed by the Turkish government. For the purpose of facilitating the payment of the indemnity instalments, as provided for in the Peking protocol of 1901, there has been instituted at Shanghai an international commission of bankers, upon which all the treaty powers are represented.²³

In connection with these unions for local and restricted purposes, it also seems proper to mention two important organizations, which aim to unify and make interchangeable the coinage of the member states. Such are the Latin monetary union, formed in 1865, and comprising France, Belgium, Italy, Switzerland, and Greece, and the Scandanavian monetary union, formed in 1873, and composed of Denmark, Norway, and Sweden.²⁴

VII. THE AMERICAN INTERNATIONAL UNIONS

By the first international conference of American states, held at Washington in 1890, there was created a union, which in the original documents was described as "the international union of American Republics for the prompt collection and distribution of commercial information," and which is now briefly described as the International Union of American Republics. The executive organ of the union is the Bureau of the American Republics, located at Washington. The bureau is placed under a governing board, composed of the diplomatic representatives of the American republics in Washington, under the presidency of the Secretary of State of the United States. The functions of the bureau were originally confined to the collection and publication of data concerning the commerce and resources of the American republics.

By the third international conference of American states, which was held at Rio de Janeiro in 1906, the bureau was reorganized. It was constituted the executive organ of the international union, and the agent for assisting in carrying out the resolutions of the inter-

²³ The Macedonian règlement in *Arch. dipl.* 95:355. Murat, *Le controle international sur les finances de l'Égypte, de la Grèce et de la Turquie*. Paris, 1899. Engelhardt, in *Rev. d. dr. int.* 15:340.

²⁴ Willis, *A History of the Latin Monetary Union*. Chicago, 1901. Russell, H. B., *International Monetary Conferences*. New York, 1898.

national conference. It was charged with the duty of compiling and digesting all information regarding treaties and conventions between the American republics, to make special reports upon problems submitted to it by the conference, and to act as an information bureau in matters of education in any of the American countries. The third conference also declared in favor of establishing in each American republic a special commission on Pan-American affairs, which is to co-operate with the central bureau. The conference provided for several subsidiary bureaus for special purposes. The international sanitary conference of 1902 had already created an international sanitary bureau. The conference of Rio de Janeiro created two international bureaus on patents and copyrights, one to be located in Havana, the other in Rio de Janeiro; an international committee on sanitary information, composed of three experts, and subject to the sanitary bureau already created; and a commission on public and private international law. It will be seen from this that the American union comprises in its scope some of the international activities for which special unions are organized in Europe or the world at large. With respect to matters for which such general unions already exist, the American union may be said to occupy the position of a restricted union, whose activities do not conflict with the purposes and objects of the more general treaties, but which deals more specifically with the interests of the American hemisphere.

Another international union is that established by the congress of Montevideo, in 1889. The conventions framed by this congress relate to patents and copyrights and to matters of private international law. They have been ratified by five South American republics, and four European states have by special treaty signified their adherence. Unlike the International union of American Republics, this group of nations is bound together simply by treaty relations, without having established any executive organs.

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The important conventions concluded among certain European states on matters of private international law, as a result of the work of four international conferences held at The Hague between 1893 and 1904, we shall not deal with in this paper, because these conventions relate to the conflict of laws in the administration of justice,

and do not carry with them the establishment of special international organs or administrative activities.

In glancing over the list of international unions and administrative conventions, we cannot fail to be powerfully impressed with the importance which these relations have gained in modern international life. However, a just appreciation of the value of these comparatively new formations of international law we can derive only from a careful analytical study of the powers and functions of the international organs, of their relation to the national administration, and of the effect upon the latter of the conclusion of numerous administrative conventions. The nature of these relations is to be discussed in a future paper.

PAUL S. REINSCH.

AMERICAN IDEALS OF INTERNATIONAL RELATIONS

Because of the many contributions made by America to the world's ideals of government, the nation has the feeling that it is quite adequate to work out its own principles on all other subjects without the aid of any other people. "What have we to do with abroad?" said a United States senator from Ohio, only thirty years ago; and the word "un-American" covers a multitude of virtues. In fact the roots of American institutions of all kinds, social, economic, and political, are in the traditions of the English race; and American ideals have been modified by the experience of other European nations. Nor has the western hemisphere been separated from the great current of world affairs. Its destinies have been closely interwoven with those of Europe; and since 1895 the United States has awakened to the fact that it not only is a part of the sisterhood of nations, but is destined to be one of the half dozen states which will powerfully influence the future of all the continents. The world is no longer round about America; America is part of the world.

The great disturbing element in modern history is the opening up of an unknown continent to European civilization. The conventional subdivisions of Europe were disturbed, the old-fashioned balance of powers was broken up, when Spain, chiefly through the wealth derived from America in the sixteenth century, rose to be the first military, naval, commercial, and territorial power in Europe; then the Protestant Reformation set England off as the enemy of France and Spain. That America was rich seemed to Drake a reason for plundering it; that his colonies were plundered led Philip II. to fit out the Invincible Armada of 1588; that the Armada was defeated caused Spain in 1604 to yield a peace in which the English would make no pledge against colonization in America; the peace of 1604 opened the way for the English to plant Virginia in 1607; that Virginia was planted was a new reason for hostility between the two naval and colonizing powers. From that time Spain, Holland, France, and England were rivals, not only in European wars and in

contests for the carrying trade, but in seizing America. Their trading companies quarreled and fought each other for the possession of harbors like New York, and fur preserves like Hudson Bay. The little colonies sent embassies and naval expeditions upon each other; and more than once rivalries in the colonies led to wars in Europe.

During the seventeenth century the natural enemy of the English colonist was the Spaniard. Though from the treaty of peace of 1604 to the opening of the era of general wars in 1689 the two countries were for the most part nominally friends, the diplomacy of England and of the colonists alike was devoted to justifying by dispatches or by double-shotted guns the successive takings of territory claimed by Spain. First Virginia, in 1607; then various West India Islands, culminating with the conquest of Jamaica in 1655; then the Carolinas in 1664; then, by the treaty of Madrid in 1670, after a century of denial Spain was compelled to admit that there might be such a thing as a lawful English colony in America. With Holland the traditional friendship between two neighboring Protestant powers was broken in 1651, when England began to move against the Dutch commerce; and four naval wars followed within twenty years, in the course of which the Dutch lost New Netherland, which was their footing in the American continent. The French were strongly seated on the Saint Lawrence, and notwithstanding two wars, held their own both there and in Nova Scotia.

From 1689 to 1763, in four great wars crowned by the treaties of Ryswick in 1697, of Utrecht in 1713, of Aix-la-Chapelle in 1748, and of Paris in 1763, England became undisputed master of the whole of North America east of the Mississippi and the Isle d'Orleans, together with Hudson Bay. In these wars and negotiations the original issue was the determination of England, at first allied with Holland, to prevent a combination of French and Spanish power in Europe and also in the new world. England was fighting for liberty of trade in the Caribbean, and also for new territory within which to plant colonies which should not have liberty of trade with other countries. The English were looking forward to a future when eastern North America should be a populous part of a powerful empire; and in the process developed the principle that the power that has control of the seas can pick up the enemy's col-

onies and destroy his commerce at pleasure, the principle to which a modern writer has given the name of Sea Power.

Although the colonists went obediently to war whenever they were officially informed that the Temple of Janus was open in Europe, and accepted such terms of peace as were agreed on by European cabinets, they began to see that they had a share in their own international destiny. They took part in the wars by land operations usually under the command of an English general, by separate expeditions on their own responsibility, or in combination with British naval forces: they took Quebec in 1629, Port Royal in 1690, aided in the humiliating failure at Cartagena in 1740, captured Louisburg in 1745, and helped to take it again in 1758. Their privateers shared in the delightful risks of commerce destroyers in all the wars. They had a confused sense that, while from one point of view they were a part of the British empire, from another standpoint they were allies of the mother country.

Thus prepared by a century and a half of relations with other countries, the revolting colonies in 1775 easily took up the task of a nation; and no part of the triumph of the Revolution is more striking than the quick acceptance of the United States of America as one of the sisterhood of nations. France, Holland, and Spain all had old grudges, which were gratified by welcoming this separated scion of the English stock. Spain alone realized that the United States was the first independent power that had ever been established in America, and that its success spelled the eventual breaking down of the ideal of European colonies. Not even Spain understood that independent America meant eventually a disturbance of the world's balance of power.

In foreign relations the process of nation-making went on smoothly. At first a secret committee of congress was corresponding through unofficial agents with continental powers; in a few weeks the Continental Congress was commissioning ministers and giving them instructions; in a few months, through the skill of Franklin, John Adams, and John Jay, the three most successful diplomats of that period, the United States of America were proposing treaties to His Most Christian Majesty of France, and to their High Mightinesses the States General of Holland. For the first time,

America came into friendly relations with other than English-speaking people, and the French treaty of 1778 was not simply the means of obtaining aid, without which the revolution would have failed; it included the untaxed admission of French goods, French officers, and French political ideas into America. In 1780 the United States even entered into the Armed Neutrality, in which the other members were Holland, Russia, and the northern powers. Within the next five years commercial treaties were negotiated with Holland, Prussia, and Sweden.

Still greater was the triumph of the treaty of peace, in 1782, which was in essence a partition of sovereignty in America between Great Britain, Spain, and the United States. For the moment, the British saw the necessity for conciliating the daughter country, acquiesced in ample boundaries, and seemed likely to make such concessions of trade as would keep the United States a special British market. Then came the first of several critical errors by Great Britain. Observing that the French trade had already dropped off, and believing that the states would not and could not form a close union, the desired treaty was denied; and on both sides exasperating questions, of small moment in themselves, were allowed to accumulate.

The practical lessons of the Revolution, as to external affairs, were first of all that the new republic, however little experienced in international relations, had diplomats who could make the most of every advantage. John Adams, emerging from his law office, was as vigorous and almost as successful as Franklin, the cosmopolite statesman.

The second ideal was that the United States was to be a sort of makeweight between France and England, thus helping to break up the European balance of powers, which then consisted of England, France, Prussia, and Austria. The commercial ideal of the time was that of a country without manufactures and exporting raw products, which desired free trade outward, and was willing to admit foreign commerce on equal terms with its own. It was therefore a keen disappointment when England treated the United States not only as politically but as commercially independent, by withdrawing the favorable status which the colonies had enjoyed in their trade with each other. For forty years to come the West India trade was not

open to American bottoms. The consequence was an American theory, not at first shared by any other nation, that colonial systems and monopolies of colonial commerce were in their nature unjust and unfriendly to other powers.

All these crude and not altogether harmonious ideals were tested, or rather deflected, by the quarter century of European wars following the French Revolution of 1789. Though recognized as a sister nation, the United States was only a little sister, destined to ask for many things not thought by her elders to be good for her. Lacking a navy, American diplomacy could be backed up by force only when directed against Canada or the Spanish possessions; and in the Napoleonic wars the great contestants both looked upon the United States as an international factor only because of her vexatious neutral trade. Under these circumstances it was partly luck, but still more the farsight of her statesmen, which for the ten years from 1793 to 1803 made American diplomacy undeniably successful. The effort of the French minister, Genet, to stampede the Americans away from their President was a failure. A threat of war brought England to concede the Jay treaty of 1794, of which the negotiator might have said "a poor thing, but mine own." It had the unquestionable merit of preventing war and securing a part of the desires of the Americans. The Spanish treaty of 1795 cleared the southwestern boundary. After committing the blunder, so much worse than a crime, of trying to bribe the American negotiators in the X. Y. Z. affair, the French government in 1800 ended a naval war by a favorable peace. In 1803, after a brief renewal of Louis Fourteenth's dream of a combined French and Spanish colonial empire, Napoleon turned over the lower Mississippi and the immense Louisiana territory to what thus became the leading power in America.

Then came twelve years of humiliation, in which the Jay treaty was allowed to expire and could not be renewed. In the renewal of the death grapple between "the elephant and the whale," the French army and the English navy, the rights of American neutral commerce were ignored. Established principles of international law were set aside, and fifteen hundred American merchantmen were made prize to one or the other of the belligerents by a series of iniquitous orders in council and decrees. American sailors were seized

by British and even by French cruisers on the high seas, — in one case out of a duly commissioned American man-of-war. The Yankee shipmasters protested and at the same time went on making money by various innocent or fraudulent evasions of their neutral obligations.

After eight years of fruitless diplomacy the country entered into the war of 1812 at the inopportune moment when Napoleon was penetrating Russia, there to be overwhelmed by the snows. The difficulty was that in the death grapple between England and France the rights and the wrongs, the friendship or the hostility, of America seemed a little thing. Jefferson discovered that great nations at war are not moved by ideals of permanent self-interest or by the complaints of a defenseless government.

Nevertheless, during the war of 1812, the Americans discovered that they possessed a talisman which could move even proud Albion: the victories of American cruisers in eleven out of thirteen ship duels, combined with the heroism of the privateers, convinced the English that after all David was a likely youth, whose sling might disturb the peace of the nations. Hence in the peace of Ghent, in 1814, terms highly favorable to the United States were secured.

From that time down to the Civil War, the United States had the respect of all European nations, and the advantage in most negotiations. It was a period when the hemispheres were educating each other. From America proceeded a current of popular government which, first revealed in the French Revolution, ran through western Europe. France, Switzerland, Germany, Italy, Spain, Greece, and, above all, England, felt the democratic spirit, accepted liberal constitutions or fundamental statutes, occasionally set up temporary republics, and in Switzerland revived and perpetuated the ancient republican spirit. On the other hand, the Americans by the right of descent took to themselves the splendid heritage of English literature; outside the works of their statesmen they had little else to read before the dawn of their own golden age of literature about 1830. Direct French influence declined after the eighteenth century, but the Germans, through their immigrants, through their influence on American educators, through their love for music, became a vital force in America. Every immigrating race brought some of its folk lore and traditions, and in the case of the Germans its national

beverages. Americans like Bayard Taylor visited Europe and wrote popular accounts of their experiences; while scores of Europeans published their American travels. The Atlantic, no longer a barrier between nations, was bringing the old world and the new into a common understanding.

Before the French wars were over began a movement which totally changed the relations of the United States to her neighbors: the revolt of the Latin-American colonies, beginning in 1806, renewed in 1814, and completed in 1825, removed from both the North and South American continents every foreign flag except that of Great Britain; and thus opened up a field of influence and of annexation in which the United States was paramount. The consciousness of a new responsibility was seen in the Monroe Doctrine of 1823; and the British, through the offer of Canning to make a joint declaration against the interference of the Holy Alliance, recognized the United States as the only other substantial American power. Within ten years thereafter Great Britain gave up her colonial system, then nearly two centuries old; met the United States half way in compromises on the boundaries of Maine and of Oregon; entered into a reciprocity treaty in 1854 for Canada; and in every way strove to undo the national sense of ill-usage from the mother country. Great Britain made no effort to prevent the expansion of the United States in Texas, New Mexico, and California; and when those annexations brought up the long-debated question of an Isthmus canal, by the Clayton-Bulwer treaty of 1850 again recognized the fact that the United States had at least an equal interest in a waterway across the narrow lands.

In territory, in prestige, in influence, in relations to the far distant canal, the United States occupied a bold and strong position in the eyes of the world; and American influence was felt at the Antipodes. In 1844, taking advantage of the lodgement of European powers in China, a commercial treaty was obtained with that power. In 1854 the United States, without the aid or license of any other nation, broke down the wall of seclusion which inclosed Japan, and opened up the commerce and the political life of that people to western influence. The country was eager to annex Cuba, and thus to acquire a foothold in the Caribbean Sea; and three or four times seemed on the point of accomplishing that purpose.

Perhaps this spirit of territorial expansion was at that time the dominant ideal of the country in foreign relations; and it would have been more successful but for what was really an accidental complication with the growth of slavery. A second ideal of the time was that of special interest in Latin-America, based upon the notion of two spheres of the world's diplomacy, an eastern and a western, each separate from the other. Another ideal was that of freedom of movement about the world: Americans expected to be admitted into any country which they thought they would like to see; the Yankee clipper ship carried the American flag into every sea; and Americans stood for the right of neutrals to carry on their commerce, even though inconvenient to one or the other of two belligerents. So far as they could, Americans carried the political ideals of free movement, of equality and self-government into international relations.

The Civil War disturbed international harmonies which had lasted for two generations, and upset the dearest American tenets of international law. The northern conception that the southern confederacy was a treasonable riot, not deserving the amenities of honorable warfare, did not fit with the usual principles of international law, nor with the practice of blockading southern ports and exchanging prisoners of war. To the mind of the federal government there was no such thing as neutrality in the Civil War, and duly commissioned cruisers, issuing from southern ports to prey upon northern commerce, were looked upon as nothing but pirates; while the recognition by Great Britain of the belligerency of the Southern Confederacy, nearly a month after that belligerency had practically been acknowledged by President Lincoln's blockade proclamation, was then, and for ten years after, considered a deliberate affront. When the British mail steamer *Trent* was seized on the high seas, President Lincoln was obliged to say that we seemed to be doing what had caused the war of 1812 when done by Great Britain. Privateering also, which from the dawn of colonization to the end of the war of 1812 had been the favorite pursuit of adventurous seamen, was now held up as a crime against humanity.

The reason for this outburst of public opinion was partly a feeling of rage at what seemed like the intention of foreign governments to favor the Confederacy. The most decisive battles in the first two years of the civil war were fought in the offices of the British and

French foreign ministers in London and Paris. When Earl Russell, under pressure from our minister, Charles Francis Adams, declared that he would not again receive the confederate envoys, the first redoubt was carried; when in 1862, Mr. Gladstone, a member of the government, publicly declared that "Mr. Jefferson Davis and other leaders of the South have made an army; they are making a navy; and they have made a nation!" England and many thoughtful men in the United States thought the battle had gone against the union. Foreign relations meant something when the outcome of the Civil War depended on the question whether or not foreign nations would forego their cotton, admit the right of blockade, hold off their vessels of war, and leave the struggle to be fought out on the continent of North America.

Eventually the skill of Mr. Adams in England, combined with some timely victories, persuaded England, in whose wake followed France, that the Confederacy would probably fail. Unfortunately, in derogation of international law several confederate cruisers built in British ports were allowed to go to sea, and the most destructive of them, the *Alabama*, gave her name to a sentiment and a negotiation, which involved Great Britain and the United States in dangerous controversies. It was not the British nation, but the aristocratic government for the time being, which had hoped for confederate success; and in 1867 a reform in the suffrage liberalized the government. The new dispensation was shrewd enough to see the danger of leaving alive the resentment of the victorious north; hence in 1869 Great Britain agreed to a commission of arbitration to decide upon the American claims, under certain previously accepted rules, which made it certain that Great Britain would be adjudged in the wrong. This was a great concession for a proud people to make; but it probably averted war, and certainly led to the Geneva arbitration of 1872, which practically found a verdict against Great Britain, but limited the damage to fifteen and a half million dollars. While this controversy was pending the United States also adjusted a long standing account with Napoleon III., who had taken advantage of the civil war to set up a despotism in Mexico. In 1867 he was compelled to withdraw his troops without arbitration and without indemnity.

In 1875, therefore, the United States found almost all the old grievances adjusted. The civil war made the world understand that there was enormous potential military strength in America; but that the people preferred peace, and had no objections to other nations making sacrifices to preserve it. The Americans had a new ideal of their position in the world, and felt that principles of international intercourse which were desirable for their comfort must perforce be international law. If they captured a vessel bound to Mexico on the ground that her cargo was bound to Texas, thenceforth other nations must accept that principle; if they intended that no other power should take Cuba away from Spain, that, too, was "crownner quest law." The most important residuum of the Civil War was, however, a great bitterness toward Great Britain, because the action of that power was supposed to have prolonged the war; it was nothing like the bitterness felt by the Confederates toward the same power, because they felt that the English had deserted them in their hour of need.

The United States was now indubitably a great power, but not a world power so long as most of her controversies and interests were within the two Americas. The rapid growth of general military service on the continent brought about difficulties with young men who emigrated to America and afterward returned home, and by an act of 1865 and a series of treaties, the United States admitted the principle that a naturalized American citizen might lose his citizenship through making a stay too long in his country of origin; and this meant, of course, that a man might in the course of his life be the acknowledged citizen of several different powers. In Latin-America the United States began to use her great influence to heal dissensions, or at least to compel the rival powers to come to terms. In 1881 the effort to hold back Chile from annexing Peru was a flat failure. In 1890 the national government was curiously seen espousing the cause of a desperate dictator against a popular congress in Chile. In 1895 the United States compelled Great Britain to arbitrate a boundary claim with Venezuela. In 1903 the same power was protected against a threatened military occupation by Germany. These acts, combined with remarkable dispatches by Secretary Olney, in 1895, on the Monroe Doctrine, showed that the United States

had an enlarged ideal of the duty to keep peace in America and to prevent European powers from setting up colonies or protectorates.

This general theory was extended to the Pacific, where the United States claimed a share in the Samoan Islands. It was shown in Cuba, where the United States compelled Spain to make peace after a ten years' civil war, in 1878; and twenty years later sent an armed force, which compelled the Spaniards to give up the island. By the annexation of the Philippines and other small Pacific islands and of the Hawaiian islands in 1898 and 1899, by sharing in the expedition of 1902 against the Chinese Boxers, the United States asserted an interest and a duty in Asia. The possession of the Philippines aroused new interest in the Panama Canal as a connection between the opposite coasts of North America and a highway from the North Atlantic to the far Pacific. When, in 1903, the United States came into possession of the canal strip by a treaty with the infant republic of Panama, there could no longer be any claim that the United States was simply an American power. From Manila to Maine, from Alaska to Porto Rico, the influence and the majesty of the United States is felt.

A result of this swift and eventful diplomatic experience is that Americans hold to an ideal of open and almost public diplomacy. Tocqueville, in 1835, thought democracy unfavorable to a strong foreign policy. Yet nothing upon which the people of the United States have set their hearts has been denied them: when they wanted unrestricted trade with other people's colonies, eventually they got it; when they wanted reciprocity with Canada, they had it; when they wanted to limit international trade by protective tariffs, all the European countries except Great Britain fell in with that notion. Democratic simplicity, backed up by the force of ninety million people, is sometimes brutally frank and explicit, but it carries its points, as when, in 1898, the Spaniards discovered that the American envoys in Paris had not the smallest intention of conceding any hairsbreadth of what they had been instructed to urge.

Americans are little accustomed to consider the feeling of weaker neighbors. From 1789 to 1898 our diplomacy with Spain was a succession of ultimata, coming up to the abandonment of Cuba; hence people seem to suppose that the absorption of Canada can be

brought about simply by talking about it; that we can annex Mexico and Central America whenever we feel like it; that the British West Indies are held by our sufferance. Americans think diplomacy, especially with weak powers, a kind of *solitaire*.

As to colonial trade, the United States has seen a great light since it has acquired dependencies; and we are now applying to the Philippines much the same limitations as to coasting trade and the movements of commerce as those which caused such resentment when continued by Great Britain in the West Indies after the Revolution. We stand for the open door in China, and for the closed door in our own dependencies.

Americans have an ideal of influence in Asia, already strong both in trade and in diplomatic influence in Japan. They have already exercised almost an authority in the adjustments between western powers in general and the Chinese government, standing in general for fair dealing and the integrity of the empire; yet on the other hand willing to offend four hundred million people by petty squabbles on a steamer dock, as to whether a particular Chinaman is a merchant or a mechanic.

Americans are prone to think that a nation with so many people, so many millions of money, and so many ships of war, must have always sound views on contested questions of diplomacy; what is desirable for their comfort and the peace of their neighborhood seems to them international law. In 1895 Secretary Olney, in his dispatches on the Venezuela question, declared that the Monroe Doctrine was

American public law firmly established. * * * today the United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition.

The very term international law means something that is a fiat because of international agreement and general acceptance. The true spirit of the country is better expressed in its warm interest in the development through The Hague Tribunal of a method of settling international questions outside the fiat of a particular country. If there be an American ideal of the relations of this country with the outer world it is one of peace founded on mutual understanding and mutual respect.

ALBERT BUSHNELL HART.

THE EXTENT AND LIMITATIONS OF THE TREATY- MAKING POWER UNDER THE CONSTITUTION

The power to make treaties with other nations is an inherent attribute of the sovereign power of an independent nation.

Where the treaty-making power is exercised by the sovereign power of a nation, the right to treat with other nations rests wholly in sovereignty and extends to every question pertaining to international relations.

Where, however, the treaty-making power is not exercised by the sovereign power of the nation as a whole, but has been delegated to a branch of the government by which it is exercised in a representative capacity, the treaty-making power there, although it arises from sovereignty, rests in grant, and can be exercised only to the extent of and in accordance with the terms fixed by the grant.

So in the United States, where the people, as the sovereign power, have delegated through the medium of their State conventions or State legislatures the treaty-making power to a designated section of the Federal Government under the Constitution, such power rests in grant and is to be measured and exercised under the terms of such grant. The people, as the sovereign power of the nation, may by amendment to the Constitution enlarge or curtail the power delegated, or change the method of exercising such power, or the branch of the government authorized to exercise it; but subject to such changes, the provisions of the Constitution must always determine where the treaty-making power is lodged and the extent of such power and the manner of exercising it. The Federal Government is one of delegated and enumerated powers, and whatever inherent right that government may have to exercise the treaty-making power for the nation, such right is subject to the organic or fundamental law of the nation.

The adoption of the 14th Amendment to the Constitution defining United States citizenship, as distinct from and independent of State citizenship, and prohibiting the abridgement by any State of

the privileges and immunities of citizens of the United States, has materially enlarged the jurisdiction of the Federal Government, but has not effected any change in the character of that government. It is an emphatic recognition that the Federal Government is national as befits the central government of a nation, but it does not remove the constitutional limitations imposed upon the Federal Government in its relations to the States.

The United States Supreme Court has held in the *Slaughter-House* cases (16 Wall. 36) that the citizenship of the United States, as defined by the 14th Amendment, is the primary citizenship, and that State citizenship is secondary and dependent upon it, nevertheless the Supreme Court has also held in *Hodges v. United States* (203 U. S. 1), as stated in the language of Mr. Justice Brewer, that notwithstanding the adoption of these three amendments [13th, 14th, and 15th] the national government still remains one of enumerated powers, and the 10th Amendment which reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," is not shorn of its vitality.

The question, therefore, of the extent and scope of the treaty-making power resolves itself into one of constitutional construction and interpretation.

By Section 2 of Article II. of the Constitution the power to make treaties is granted to the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur.

This power is granted in general terms and without the reservation of any part of it to the States or to the people; neither is there any such reservation elsewhere in the Constitution. On the contrary, in Section 10 of Article I. of the Constitution, the power to make any treaty is expressly forbidden to the States. It is true that one of the following paragraphs of the same section provides that

no State shall, without the consent of Congress, * * * enter into any agreement or compact with another State, or with a foreign power
* * *

But so far as this provision applies to interstate relations it does not concern the treaty-making power of the nation, and, as applied to

the relations between a State and a foreign power, it is impossible to construe this provision as a reservation of any part of the treaty-making power to the States. Strictly speaking it is the denial of the right of any State to make even a contract of lesser importance than a treaty with a foreign government, without the consent of Congress. In a broader sense it suggests a method, if Congress is so disposed, of dealing with questions in which the nation at large is not interested, if any such questions there are, between a State and a foreign government, provided, however, that the agreement thereon does not rise to the dignity of a treaty in the sense in which that term is used in the Constitution. The meaning of the term treaty is considered more particularly later. For the present it is sufficient to note that a distinction was intended to be drawn between the terms "treaties" and "agreement and compact" as used here. This is evident from the separate classification made, and it is not to be assumed that there was a confusion of terms. (*Holmes v. Jennison*, 14 Peters 571.)

In the case of *Virginia v. Tennessee* (148 U. S. 503), Mr. Justice Field, delivering the opinion of the Court, discusses the meaning of these terms as follows:

Looking at the clause in which the terms "compact" or "agreement" appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States which may encroach upon or interfere with the just supremacy of the United States. Story, in his Commentaries (§ 1403), referring to a previous part of the same section of the Constitution in which the clause in question appears, observes that its language "may be more plausibly interpreted from the terms used, 'treaty, alliance, or confederation,' and upon the ground that the sense of each is best known by its association (*noscitur a sociis*) to apply to treaties of a political character; such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges;" and that "the latter clause, 'compacts and agreements,' might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of States bordering on each other." And he adds: "In such cases the consent of Congress may be properly required in order to check any infringement of the rights of the

national government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief."

But whatever may be the meaning of "agreement and compact," the authority to enter into them must be obtained by a State from the Federal Government, so that no part of the treaty-making power is reserved to the States under this provision, and it is not to be construed in derogation of the exercise of the treaty-making power under the Federal Government.

The question of the manner in which the Federal Government, in distinction from the States, may enter into international agreements less formal than treaties in the constitutional sense, but of binding force internationally, and the basis upon which such agreements rest, is not within the scope of this discussion.

It appears, therefore, that no part of the power to make treaties has been retained by the States or the people and that, except for the general right to change by amendment any of the provisions of the Constitution, the power to make treaties for the nation has been delegated without reservation to the President with two-thirds of the Senators present concurring.

The delegation of this power without reservation, however, does not necessarily mean that it may be exercised without limitations, and the question of what, if any, limitations there are still remains to be considered.

Before entering upon the discussion of this question, it is essential that the purpose for which the power is granted be defined, as this purpose is a condition surrounding its origin and existence and more than a mere limitation imposed upon its exercise.

This purpose is two-fold: In the first place, the treaty-making power, in common with all the other powers granted to the Federal Government, partakes of the general purposes for which the Constitution was adopted, one of which is, as recited in the preamble of the Constitution, "to promote the general welfare;" and in the second place, the particular purpose for which it is granted is to enable the Federal Government to make treaties for the United States — that is, to enter into international obligations with respect to matters which are properly the subject of negotiations with foreign powers.

These two conditions are, therefore, inherent in the nature of the treaty-making power and must be regarded as defining generally its sphere of operations. They underlie the whole subject, and should be borne in mind in considering the question of limitations imposed upon its exercise within such sphere.

The Constitution in terms imposes no specific limitations upon the subjects to be dealt with or the stipulations to be contained in treaties, and it must be presumed that in thus conferring the power generally and without definition the intention was that it should embrace every question affecting the interests of the nation in its international relations, subject only to such limitations upon the exercise of such power as might arise on account of the fundamental or organic law of the nation.

As stated by Mr. Justice Clifford, in delivering the opinion of the United States Supreme Court, in *Holden v. Joy* (17 Wall. 242)—

Inasmuch as the power is given, in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States.

These limitations upon the exercise of the treaty-making power are due to the fact that the power itself rests in grant, as shown above, and being one of the delegated powers, stands on no higher footing than any of the other powers delegated under the Constitution, and, as the power to amend the Constitution is distinct from the treaty-making power, it cannot be exercised to the detriment or exclusion of the other provisions of the Constitution.

In the language of Mr. Justice Field, in delivering the opinion of the United States Supreme Court, in the case of *Geofroy v. Riggs* (133 U. S. 267) —

The treaty power, as expressed in the Constitution, is in terms unlimited excepted by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States.

The only constitutional limitations and restrictions imposed upon the exercise of this general power to make treaties are therefore to be found in the provisions of the Constitution which expressly confide in Congress or in other branches of the Federal Government the exercise of certain of the delegated powers and establish certain rights which may not be interfered with, or impose certain obligations which must be observed by the Federal Government, and, finally, which reserve to the States or to the people all powers not granted to the United States.

In considering the effect of these several provisions as possible limitations upon the treaty-making power, it will be convenient to have in mind the remaining provisions of the Constitution, not heretofore cited, which have a direct bearing upon the extent of the treaty-making power. These provisions are as follows:

ARTICLE III.

SEC. 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority; * * *

ARTICLE VI.

* * * This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby — anything in the Constitution or laws of any State to the contrary notwithstanding.

It will be observed that these provisions relate to the effectiveness of treaties when made rather than to the making of them, but the question of their effectiveness directly concerns the extent of the power to make them and the bearing of these provisions upon the treaty-making power therefore requires examination.

The judicial power of the United States, exercising the jurisdiction thus conferred upon it, has had occasion in construing the provisions of Article VI. to point out that although treaties authoritatively made are primarily international contracts, yet, in consequence of this provision making treaties the supreme law of the land, they are also rules of municipal law to be applied by the courts.

Under the decision of the United States Supreme Court it is recog-

nized that no additional restraint or obligation is imposed by this provision of Article VI. upon the national government in its treaty relations with other nations; it is held to apply only to treaties in their domestic aspect, and its effect is to carry them beyond mere contractual obligations between nations and to incorporate them as the supreme law of the land into the body of municipal laws and make them binding on the courts. In drawing this distinction, however, the Supreme Court has expressly limited the application of this provision, which in terms applies to all treaties, to such treaties only as are self-executing, requiring no legislative or executive action to carry them into effect. Treaties which in themselves are incomplete as laws, or otherwise require legislation to make them operative, address themselves to the executive and legislative rather than to the judicial branch of the government, and are not self-executing as that term is used here, as will appear more fully below.

These distinctions are clearly set forth in the opinion of the United States Supreme Court, delivered by Chief Justice Marshall, in the case of *Foster and Elam v. Neilson* (2 Peters, 313)—

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is *infra territorial*, but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the Court.

The rule thus concisely laid down by the great Chief Justice was re-stated and followed in the *Head Money* cases (112 U. S. 598), Mr. Justice Miller delivering the opinion of the Court, as follows:

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the

judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that "this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land." A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

In connection with this question of the effect of treaties as municipal laws, the further question of the relative value of laws made by treaties and laws made by Congress has also been settled by the Supreme Court. By Article VI., above quoted, they are both equally made the supreme law of the land, and in construing this provision it has been held that they are entitled to equal value as municipal law. Two or three citations from the long line of cases in which the question has been considered in all its bearings will be sufficient to show the rule adopted by the Supreme Court. It was held in the case of *The Cherokee Tobacco* (11 Wall., at p. 620), that "a treaty may supersede a prior Act of Congress and an Act of Congress supersede a prior treaty."

Also in the case of *Whitney v. Robertson* (124 U. S. 190), the Supreme Court held, Mr. Justice Field delivering the opinion of the Court:

By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.

So also in the Chinese Exclusion cases it was held by the Supreme Court that existing treaty provisions were repealed by subsequent Congressional legislation conflicting with or violating such provisions. In the language of the opinion of the Court, delivered by Mr. Justice Field in the first of those cases (130 U. S. 581)—

By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the Sovereign will must control.

The effect of legislation upon conflicting treaty stipulations was elaborately considered in the *Head Money* cases, and it was there adjudged "that so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal." (112 U. S. 580, 599.)

It appears, therefore, that under the decisions of the Supreme Court the effect of Article VI. is to make self-executing treaties of equal value as laws with acts of Congress, but like acts of Congress subject to repeal by subsequent legislation. Whether or not this provision of Article VI., making treaties the supreme law, has any coercive force to compel legislative action to carry into effect treaties which are not self-executing is not directly dealt with in the decisions above referred to. Citations on that point are not necessary, however, for it is clear that if this provision making treaties the supreme law of the land does not prevent Congress from repealing by later legislation treaties which are self-executing, there is no coercive effect beyond the moral obligation arising from national good faith and honor, and the obligation to make operative a treaty requiring legislative action to carry it into effect is no greater than the obligation to leave undisturbed a treaty already in force.

A treaty, therefore, under this provision of Article VI., as construed by the Supreme Court, has the value of a law of the land, so far as the judicial branch of the government is concerned, only with the

consent of the legislative branch of the government. But here again must be drawn the distinction between treaties as laws and as contractual obligations. The nullification of a treaty as a law does not necessarily relieve the nation as a whole of its obligations under such treaty as a contract, but in that case the treaty is no longer the supreme law of the land, and the question of the national obligation under it concerns the legislative and executive branches and not the judicial branch of the government.

As stated in the opinion of the United States Supreme Court, in *Whitney v. Robertson* (124 U. S. 194), delivered by Mr. Justice Field —

If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance. In *Taylor v. Morton* (2 Curtis 454, 459) this subject was very elaborately considered at the circuit by Mr. Justice Curtis, of this court, and he held that whether a treaty with a foreign sovereign had been violated by him; whether the consideration of a particular stipulation of the treaty had been voluntarily withdrawn by one party so that it was no longer obligatory on the other; whether the views and acts of a foreign sovereign had given just occasion to the legislative department of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise, were not judicial questions; that the power to determine these matters had not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; and that they belong to diplomacy and legislation, and not to the administration of the laws. And he justly observed, as a necessary consequence of these views, that if the power to determine these matters is vested in Congress, it is wholly immaterial to inquire whether by the act assailed it has departed from the treaty or not, or whether such departure was by accident or design, and, if the latter, whether the reasons were good or bad.

Inasmuch as the present discussion is concerned chiefly with the *infra-territorial* effect of treaties as laws under the Constitution, it is not necessary to go further into the question of the responsibilities of the nation as a whole for the breach or abrogation of treaties, which involves the consideration of treaties as international contracts rather than as laws, and therefore extends beyond the range of constitutional limitations and into the field of international law.

Before passing from the consideration of Article VI., the effect of its provisions upon treaties in their relation to State constitutions and laws requires brief attention. In addition to the general provision making treaties the supreme law of the land this Article further specifically provides that "the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

If any definition of the meaning of the expression "supreme law of the land" in relation to State laws and constitutions is necessary, this provision supplies it. One citation of many will be sufficient to show the effect given to this provision by the Supreme Court.

In *Hauenstein v. Lynham* (100 U. S. 483), it was held, Mr. Justice Swayne delivering the opinion of the Court:

A treaty cannot be *the supreme law of the land*, that is, of all the United States, if any act of a State legislature can stand in its way. If the Constitution of a State (which is the fundamental law of the State and paramount to its legislature) must give way to a treaty and fall before it, can it be questioned whether the less power, an act of the State legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State, and their will alone is to decide. If a law of a State contrary to a treaty is not void, but voidable only, by a repeal or nullification by a State legislature, this certain consequence follows, — that the will of a small part of the United States may control or defeat the will of the whole. *Ware v. Hylton*, 3 Dall. 199. * * *

It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity. See also *Shanks v. Dupont*, 3 Pet. 242; *Foster & Elam v. Neilson*, 2 id. 253; *The Cherokee Tobacco*, 11 Wall. 616; *Mr. Pinkney's Speech*, 3 Elliot's Constitutional Debates, 231; *The People, etc., v. Gerke & Clark*, 5 Cal. 381.

From the foregoing review of the decisions of the Supreme Court construing the effect of the provision of Article VI., making treaties the supreme law of the land, it appears that treaties in force as laws are subject, in common with legislative enactments, to repeal by subsequent legislation, and that while in force as laws they address themselves to the judicial branch of the government, and as forming a part of the municipal law must be applied by the courts. It remains to consider how far they are subject to the constitutional

limitations imposed upon legislative enactments, or to the other constitutional limitations already indicated.

As hereinabove shown, the only limitations upon the exercise of the treaty-making power arise from the fact that it is one of the delegated powers resting in grant and is limited by the terms of the grant, and whatever limitations there are under the Constitution are due, on the one hand, to the division of certain powers between the several branches of the Federal Government, and, on the other hand, to the denial of certain powers to the Federal Government, and the reservation of certain powers to the States or to the people. The present question, therefore, brings the discussion back to that point.

In considering this question it will be convenient to observe the distinction between the classes of limitations above indicated.

Taking up first the possible limitations suggested by the division of certain powers under the Constitution among the several branches of the Federal Government, it necessarily follows from the subordination of the treaty-making power to the Constitution that it must be so exercised as not to encroach upon the powers delegated to the executive, legislative, or judicial branches of the government. It can neither override the powers delegated elsewhere nor deprive the other branches of the government of the right to exercise the powers entrusted to them by the Constitution. So far as the judicial branch of the government is concerned, no encroachment by the treaty-making power has arisen or can arise, for under Article III., Section 2, of the Constitution, quoted above, the judicial power extends to all cases arising under treaties, which provision has been construed to mean, not simply jurisdiction to apply treaty stipulations as rules of law, but the power to declare void a treaty in conflict with constitutional limitations. It is to be noted, however, that no treaty as yet has ever been declared void by the Supreme Court. So far as the executive is concerned, no conflict has arisen or is likely to arise, as that branch of the government is a part of the treaty-making power and not only has the initiative in the making of treaties but also has the right to withhold them from final ratification even after they are approved by the Senate. But between the legislative branch and the treaty-making power the question of its independent jurisdiction over matters entrusted to Congress has frequently been at issue.

In the House of Representatives the point has repeatedly been urged that where certain powers are expressly confided by the Constitution to Congress the concurrence of both Houses of Congress is necessary in order to make effective a treaty undertaking to deal with such powers. This proposition, in a somewhat modified form, has now the sanction of custom, and, so far as the matter has been passed upon by the courts, is supported by judicial decisions.

The question was discussed in Congress as early as 1796 in connection with the treaty of 1794 with Great Britain. The appropriation of money was necessary to carry its provisions into effect, and the House asserted the right to deliberate upon the expediency or inexpediency of carrying out such provisions, inasmuch as, under the Constitution, the concurrence of both Houses of Congress was necessary for the appropriation of money.

Again in 1815 a discussion arose, under the commercial treaty in that year with Great Britain, as to the necessity for congressional action to carry into effect the regulations established by that treaty diminishing the tariff duties. In the course of the debate on the question in the House of Representatives, Mr. Cyrus King, of Massachusetts, argued on the incompleteness of such a treaty unless supplemented by legislative action, as follows:

The result of my investigation on this subject is: that whenever a treaty or convention does, by any of its provisions, encroach upon any of the enumerated powers vested by the Constitution in the Congress of the United States, or any of the laws by them enacted in execution of those powers, such treaty or convention, after being ratified, must be laid before Congress, and such provisions cannot be carried into effect without an act of Congress. For instance, whenever a treaty affected duties on imports, enlarging or diminishing them, as the present one did to diminish; whenever a treaty went to regulate commerce with foreign nations, as that expressly did with one, as the power to lay duties and the power to regulate commerce are expressly given to Congress, such provisions of such treaty must receive the sanction of Congress before they can be considered as obligatory and as part of the municipal law of this country. And this construction is strengthened by a part of the general power given to Congress, following the enumerated powers, "to make all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or office thereof." In other words, for carrying into execution the treaty-making power (that being among the other powers) in all cases where it has been

exercised on subjects, placed by the Constitution within the control of the legislative department. This construction is further strengthened by the concession of honourable gentlemen, in one case, that where appropriations of money are necessary for carrying the provisions of any treaty into effect, there legislative provision is necessary. Now, sir, to concede that the sanction of Congress is necessary in one case of enumerated and specified power, is to concede it in all such cases. (*Annals of Congress*, 1815-1816, p. 538.)

The extreme position urged by Mr. King does not seem to have been fully accepted by the House of Representatives, but there still remained such a wide divergence of view between the House and the Senate that it was necessary to refer the matter to a conference committee, and the final outcome of the discussion is stated in the report of that committee as follows:

They [the committee] are persuaded that the House of Representatives does not assert the pretension that no treaty can be made without their assent; nor do they contend that in all cases legislative aid is indispensably necessary, either to give validity to a treaty, or to carry it into execution. On the contrary, they are believed to admit, that to some, nay many treaties, no legislative sanction is required, no legislative aid is necessary.

On the other hand the committee are not less satisfied that it is by no means the intention of the Senate to assert the treaty-making power to be in all cases independent of the legislative authority. So far from it, that they are believed to acknowledge the necessity of legislative enactment to carry into execution all treaties which contain stipulations requiring appropriations, or which might bind the nation to lay taxes, raise armies, to support navies, to grant subsidies, to create States, or to cede territory; if indeed this power exists in the government at all. In some or all of these cases, and probably in many others, it is conceived to be admitted, that the legislative body must act, in order to give effect and operation to a treaty; and if in any case it be necessary, it may confidently be asserted that there is no difference in principle between the Houses; the difference is only in the application of the principle. For if, as has been stated, the House of Representatives contend that their aid is only in some cases necessary, and if the Senate admit that in some cases it is necessary, the inference is irresistible, that the only question in each case that presents itself is, whether it be one of the cases in which legislative provision is requisite for preserving the national faith or not. (*Id.*, p. 1019.)

In 1844 the Senate Committee on Foreign Relations reported adversely to the commercial treaty of 1843 with the German States on the ground of "want of constitutional competency" to make it.

This action was commented upon by Mr. Calhoun, then Secretary of State, as follows:

If this be a true view of the treaty-making power, it may be truly said that its exercise has been one continual series of habitual and uninterrupted infringement of the Constitution. From the beginning, and throughout the whole existence of the Federal Government, it has been exercised constantly on commerce, navigation, and other delegated powers. (Calhoun to Wheaton, June 28, 1844; *Treaties and Conventions 1776-1887*, p. 1230.)

Again in 1867 the question arose in connection with the appropriation of the purchase price to be paid for Alaska, under the treaty with Russia in that year. It was assumed in the discussion in the House that, inasmuch as a money payment was necessary to carry out the treaty, it was incomplete without the action of Congress, wherein lay the exclusive power under the Constitution to make appropriations, and it was urged, therefore, that the ratification of the treaty should have been conditioned upon the consent of the House. In the act of Congress, which was finally passed appropriating the purchase money, a provision was inserted, in recognition of the position taken by the House, to the effect that under some circumstances treaty stipulations "cannot be carried into full force and effect except by legislation to which the consent of both Houses of Congress is necessary."

The question again arose in 1887, under the treaty of 1884 with the Hawaiian Islands extending the reciprocity treaty of 1875 with that government, and the judiciary committee of the House was directed to report —

Whether a treaty which involves the rate of duty to be imposed on any article, or the admission of any article free of duty, can be valid and binding without the concurrence of the House of Representatives, and how far the power conferred on the House by the Constitution of the United States to originate measures to lay and collect duties can be controlled by the treaty-making power under said Constitution. (H. R. No. 4177, 49th Cong., 2d Sess.)

The conclusions reached by the committee, as stated in its report, are as follows:

That the President, by and with the advice and consent of the Senate, cannot negotiate a treaty which shall be binding on the United States, whereby duties on imports are to be regulated, either by imposing or re-

mitting, increasing or decreasing them, without the sanction of an act of Congress; and that the extension of the term for the operation of the original treaty or convention with the government of the Hawaiian Islands, proposed by the supplementary convention of December 6, 1884, will not be binding on the United States without like sanction, which was provided for in the original treaty and convention, and was given by act of Congress. (Id.)

The discussion was renewed in 1902 in connection with the reciprocity treaties then under consideration, and the question was again raised as to the necessity for congressional action to put into effect treaty provisions concerning tariff duties. Senator Cullom, chairman of the Committee on Foreign Relations, stated in a speech delivered in the Senate on the extent of the treaty-making power (*Congressional Record*, January 29th, 1902, pp. 1104-1111), that the authority of the House of Representatives in reference to treaties has been argued and discussed for more than a century, and has never been settled in Congress and perhaps never will be. The House, each time the question was considered, insisted upon its powers, but nevertheless has never declined to make an appropriation to carry out the stipulations of a treaty, and I contend that it was bound to do this, at least as much as Congress can be bound to do anything when the faith of the nation had been pledged. And this appears to me to be the only case in which any action by the House is necessary, unless the treaty itself stipulates, expressly or by implication, for such Congressional action.

In response to this declaration, the following resolution was adopted in the House:

Whereas, it is seriously claimed that under the treaty-making power of the Government, and without any action whatever on the part of the House of Representatives, or by Congress, reciprocal trade agreements may be negotiated with foreign governments that will of their own force operate to supplant, change, increase, or entirely abrogate duties on imports collected under laws enacted by Congress and approved by the Executive for the purpose of raising revenue to maintain the Government: Now, therefore, be it

Resolved by the House of Representatives, that the Committee on Ways and Means be directed to fully investigate the question of whether or not the President, by and with the advice and consent of the Senate, and independent of any action on the part of the House of Representatives, can negotiate treaties with foreign governments by which duties levied under an act of Congress for the purpose of raising revenue are modified or repealed, and report the result of such investigation to the House.

No report on this resolution appears to have been made.

The question has not been directly passed upon by the United States Supreme Court, but in the case of *Turner v. Am. Bap. Miss. Union* (2 McLean, 344), in 1852, one feature of it was squarely presented before Mr. Justice McLean, of that court, sitting in Circuit, and it was there held —

A treaty under the federal constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties, where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of the money is required, the treaty is not perfect. It is not operative, in the sense of the constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of the government can be regarded as a law until it shall have all the sanctions required by the constitution to make it such. As well might it be contended that an ordinary act of Congress, without the signature of the President, was a law, as that the treaty which engages to pay a sum of money is in itself a law.

And in such a case the representatives of the people and the States exercise their own judgments in granting or withholding the money. They act upon their own responsibility and not upon the responsibility of the treaty-making power. It cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required.

Without a law the President is not authorized to sell the public lands, so that this treaty, though so far as the Indians were concerned, was the supreme law of the land, yet, as regards the right to the proceeds of the above tract, an act of Congress is required. The treaty, in fact, appropriated the above tract of 160 acres for a particular purpose, but, to effectuate that purpose, an act of Congress was passed.

In the case of *Parker v. Duff* (47 Cal. 554), which was cited with approval by Judge Hallett, in the United States Circuit Court for the District of Colorado, in the case of *Pugsley v. Brown* (35 Fed. Rep. 688), it was held, in view of the constitutional provision that "Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States," that

the treaty-making power cannot confer upon the land department any authority, nor enjoin upon it any duty in respect to the sale, conveyance, or disposal of the public lands of the United States, except with the consent of Congress.

On the other hand, in the case of *Holden v. Joy* (17 Wall., at p. 274), at was said, in the opinion of the Supreme Court, although the point was not directly involved in the decision of the case, that it could not be admitted that the President and Senate in concluding a treaty with an Indian nation

could not lawfully covenant that a patent should issue to convey lands which belonged to the United States without the consent of Congress.

And the Court added:

On the contrary, there are many authorities where it is held that a treaty may convey to a grantee a good title to such lands without an act of Congress conferring it, and that Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political.

The views expressed in Congress, as above outlined, and by authoritative writers on the subject, show a consensus of opinion that with respect, at least, to the appropriation of money and the regulation of tariff duties treaty stipulations cannot be regarded as self-executing, and require legislative action to carry them into effect.

There is still some divergence of opinion as to whether or not other matters on which, under the Constitution, Congress is empowered to legislate can be effectively dealt with by treaties without legislative action to carry them into execution, and in the absence of a decision on the question by the Supreme Court it must be regarded as still unsettled.

It is possible, however, to distinguish between those matters which are confided to Congress exclusively, such as the appropriation of money and the raising of revenue, all bills for which latter purpose must originate in the House, which powers being exclusively in the jurisdiction of Congress are, therefore, presumably excluded from the independent jurisdiction of the treaty-making power, and those matters which are within the enumerated or implied powers of Congress, but are not entrusted exclusively to Congress, and with respect to which the treaty-making power may be regarded as having co-ordinate jurisdiction with Congress.

Many treaty stipulations dealing with some of the matters generally entrusted to Congress have been put in force under the Constitution without legislative action, and their validity has never been

questioned, so that the exercise of such powers by treaty has, to some extent at least, the sanction of custom, although, on the other hand, it has frequently been the practice in similar cases for Congress to enact appropriate legislation for carrying out such treaty stipulations.

The decisions of the Supreme Court, above referred to, determining that treaties, although valid as national obligations, are not in every case, so far as the courts are concerned, the supreme law of the land, open the way for the claim that when a treaty undertakes to deal with matters within the jurisdiction of Congress it is not self-executing, and requires congressional sanction before it becomes the supreme law of the land. Jefferson states in his *Manual* (section LII.), that in England if treaties "touch the laws of the land, they must be approved by Parliament," and that "an act of Parliament was necessary to validate the American treaty of 1783," and this was understood as a limitation on the treaty-making power of Great Britain when the Constitution was adopted. Even though it may be argued that it was to avoid the necessity for such legislative action that treaties were made the supreme law of the land by the Constitution, yet the Supreme Court has held, as above shown, that this provision applies only to self-executing treaties, and it is still open for that court to hold that no treaty dealing with matters entrusted to Congress is self-executing.

The treaty negotiated with Venezuela in 1854, which provided that no citizen of either country should accept a commission in the service of an enemy at war with the other country "under the pain of being considered as a pirate," was not submitted to the Senate by President Pierce for the reason, as stated by Mr. Marcy, then Secretary of State, that inasmuch as the Constitution provided that Congress should define and punish piracies, that subject should not be dealt with in a treaty. (Moore's *Int. Law Dig.*, vol. V., § 736, p. 169.)

But whether or not the rule will ultimately be extended, it would seem to be already established beyond question that treaty stipulations, however complete they may be in themselves, cannot be self-executing so as to become the supreme law of the land, as defined by the decisions of the Supreme Court, where they deal with those powers which are delegated by the Constitution *exclusively* to Congress. In

such cases the treaty is incomplete without congressional action, and its ratification should be understood to be conditioned upon the sanction of an act of Congress. In this connection, however, it must be remembered that treaty provisions which are merely declaratory of the law of nations, do not require legislative action to make them effective, inasmuch as the law of nations is recognized under the decisions of the Supreme Court as part of the law of the land, except in so far as constitutional or legislative provisions are in conflict therewith. (*The Paquete Habana*, 175 U. S., at p. 700; *The Nereide*, 9 Cranch, at p. 423; and *The Charming Betsey*, 2 Cranch, at p. 118.)

It will be observed that the limitations above considered are not restrictive upon the power of the Federal Government, but only upon the method of exercising such power. In such cases concurrence of action by the executive and legislative branches of the Federal Government is at the utmost all that is required to make the treaty operative as the supreme law of the land. With respect, however, to limitations arising on account of the prohibited and the reserved powers, the question presented concerns the jurisdiction of the treaty-making power over matters which are not expressly confided to Congress.

So far as concerns the prohibited powers, which term is intended here to include those restrictive obligations which are imposed as well as those powers the exercise of which is prohibited by the Constitution, it requires no argument to show that they apply to the treaty-making power as fully as they do to any other part or to the whole of the Federal Government, and are equally binding upon that power. What is prohibited to the whole may not be done by a part, and the power to make treaties under the Constitution does not include the power to amend or override that instrument. In the words of Mr. Justice Swayne, in delivering the opinion of the Supreme Court in the case of *The Cherokee Tobacco* (11 Wall. 616)—

It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our Government.

Those powers, therefore, which are prohibited, and those restrictions which are imposed under the Constitution, are beyond the reach of the treaty-making power, and not even the concurrence of the

legislative and executive branches of the government would make valid a treaty which violates such limitations.

So far as concerns the powers known as the reserved powers, it will be found, on an examination of the provisions of the Constitution bearing upon the application and extent of the reservation of powers, that a distinction must be drawn between the jurisdiction of the treaty-making power and the jurisdiction of Congress in relation to such reservation of powers.

The terms in which the reservation is made will be found in the 10th Amendment to the Constitution, and are as follows:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

The "powers not delegated to the United States" obviously do not include the treaty-making power, for, under the other provisions of the Constitution hereinabove referred to, it has already been shown that the treaty-making power is itself one of the powers delegated to the Federal Government, and is so delegated without qualification and without the reservation of any part of it to the States or to the people. The question, therefore, is how far, if at all, this reservation applies to the exercise of a power so delegated. Is the jurisdiction of the power to make treaties limited by this reservation to such powers only as have been delegated to the other branches of the Federal Government? In other words, can it be exercised only over the enumerated or implied powers to which the jurisdiction of Congress is limited in its relation to the States or to the people?

The extent of the jurisdiction of the treaty-making power over matters entrusted to Congress has already been considered, and it has been shown that a treaty affecting matters exclusively entrusted to Congress is incomplete without supplemental action by Congress, and that possibly such action may also be necessary to make effective treaty stipulations affecting any of the enumerated or implied powers delegated to Congress. In its domestic application the power to regulate these matters by treaty is at most only concurrent with the jurisdiction of Congress over them. If, therefore, the treaty-making power could deal only with matters entrusted to Congress there would seem to have been no particular occasion for delegating that power to the President and Senate instead of to the President and Congress.

It need hardly be said that to exercise such concurrent jurisdiction with Congress over the powers delegated to Congress was not the sole purpose for which the treaty-making power was established, and it is well settled, not only by the sanction of custom, but by the authority of the Supreme Court decisions, that in the international relations of the nation the treaty-making power has jurisdiction over matters beyond the jurisdiction of Congress. It necessarily follows, therefore, that it must embrace some, at least, of the powers which, if measured only by the jurisdiction of Congress, would be reserved to the States or to the people. As will appear from the cases cited below, the treaty-making power has repeatedly exercised jurisdiction over matters beyond the reach of Congress and such exercise of jurisdiction has invariably been sustained by the Supreme Court. It will furthermore be shown that Congress is empowered, under the Constitution, to legislate with respect to matters not otherwise within its jurisdiction, when such legislation is necessary to carry out treaty stipulations affecting such matters, provided always that they are matters directly touching the foreign relations of the nation and genuinely involving its international interests.

Inasmuch, therefore, as the treaty-making power is itself one of the delegated powers, and in view of the peculiar terms in which the reservation is made, stands on an entirely different footing from Congress with respect to the restrictions imposed upon Congress by the reservation to the States or the people of undelegated powers, and, as above shown, is not limited in its jurisdiction only to the powers delegated to Congress, there seems to be no reasonable ground for extending such reservation of powers in any degree to the treaty-making power, and the conclusion would seem to be inevitable that there are no so-called reserved powers so far as the treaty-making power is concerned, in its own appropriate sphere of action, with the possible exception of the police powers which will be considered later.

The most conspicuous example of the exercise of jurisdiction by the treaty-making power over matters beyond the ordinary jurisdiction of Congress is furnished by the treaties removing what may be termed the disabilities of alienage under State laws. The leading authority in support of this power to set aside State laws by treaty in such cases is *Ware v. Hylton* (3 Dall. 199), in which it was held

that the effect of the treaty of 1783 with Great Britain, the fourth Article of which provided for the payments of debts due to British subjects by American citizens in the several States, was to nullify an act of the Virginia legislature confiscating such debts due from the citizens of that State, and to cancel a payment made under such law and revive the debt and give a right of recovery thereof against the original debtor, all of which obviously is outside of the jurisdiction of Congress.

It will be observed that the treaty in this case antedates the adoption of the Constitution, but the provisions of the Constitution were held to attach to it by virtue of Article VI. thereof, by which treaties previously entered into, as well as those made under its authority, are declared to be the supreme law of the land, and the terms of this provision were regarded as establishing the supremacy of this treaty over State laws. It is true that in the opinion delivered by Mr. Justice Wilson, in this case, the supremacy of the treaty over State laws seems to be supported chiefly on the ground that the State of Virginia, having been a party to the making of the treaty, under the Articles of Confederation, was bound by it independently of the Constitution, and he is silent on the particular question now under consideration. Mr. Justice Chase, however, who delivered the leading opinion in the case, carries the argument further and holds that the treaty must be given effect as if made under the Constitution, and in this Mr. Justice Cushing agrees and Mr. Justice Patterson seems to concur, and the decision has invariably been regarded in the subsequent decisions of the Supreme Court as applying directly to the treaty-making power under the Constitution. Mr. Justice Chase says in his opinion:

If doubts could exist before the establishment of the present national government, they must be entirely removed by the 6th article of the Constitution, which provides "That all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution, or laws, of any State to the contrary notwithstanding." There can be no limitation on the power of the people of the United States. By their authority the State Constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the State Constitutions, or to make them yield to the general government, and to treaties made by their authority. * * *

Four things are apparent on a view of this 6th article of the National Constitution. 1st. That it is retrospective, and is to be considered in the same light as if the Constitution had been established before the making of the treaty of 1783. 2d. That the Constitution, or laws, of any of the States so far as either of them shall be found contrary to that treaty are by force of the said article, prostrated before the treaty. 3d. That consequently the treaty of 1783 has superior power to the Legislature of any State, because no Legislature of any State has any kind of power over the Constitution, which was its creator. 4thly. That it is the declared duty of the State Judges to determine any Constitution, or laws of any State, contrary to that treaty (or any other), made under the authority of the United States, null and void. National or Federal Judges are bound by duty and oath to the same conduct. * * *

If the Court possess a power to declare treaties void, I shall never exercise it, but in a very clear case indeed.

Mr. Justice Patterson says:

To effect the object intended, there is no want of proper and strong language; there is no want of power, the treaty being sanctioned as the supreme law, by the Constitution of the United States, which nobody pretends to deny to be paramount and controlling to all State laws, and even State constitutions, wheresoever they interfere or disagree.

The treaty then, as to the point in question, is of equal force with the Constitution itself; and certainly, with any law whatsoever.

The principles established in this case have been adopted and followed by the Supreme Court in all subsequent cases in which the supremacy of treaties over State laws in matters touching upon the interests of the nation in its international relations has been involved. A review of such cases, showing the far-reaching effect of this decision, will be found in the opinion of the Supreme Court, delivered by Mr. Justice Swayne, in *Hauenstein v. Lynham* (100 U. S., at p. 489), in which it was held that the treaty of 1850 with the Swiss Confederacy, providing for the removal of alienage disabilities in the matter of inheritance, nullified the laws of Virginia in conflict therewith.

After pointing out that the decision in *Ware v. Hylton* applied equally to treaties under the Articles of Confederation and under the Constitution, he says:

In *Chirac v. Chirac* (2 Wheat. 259), it was held by this court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage and placed them in precisely the same situation as if they had been citizens of this

country. The State law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in *Carneal v. Banks* (10 id. 181), and with respect to the British treaty of 1794 in *Hughes v. Edwards* (9 id. 489). A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a State. *Orr v. Hodgeson*, 4 id. 453. By the British treaty of 1794, "all impediment of alienage was absolutely levelled with the ground despite the laws of the States. It is the direct constitutional question in its fullest conditions. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union. *Fairfax's Devisees v. Hunter's Lessee*, 7 Cranch, 627; see *Ware v. Hylton*, 3 Dall. 242." 8 Op. Attys.-Gen. 417. Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this case, says: "Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power and may be adjusted by it." *Treat. on the Const. and Gov. of the U. S.* 204.

Applying the principles thus established to the case then under consideration, he adds:

We have no doubt that this treaty is within the treaty-making power conferred by the Constitution. And it is our duty to give it full effect.

The case of *Geofroy v. Riggs* (133 U. S., at p. 266) may also be cited as a leading authority on this point among the later cases.

These principles were again applied in the case of *Baker v. City of Portland*, in the United States Circuit Court (5 Sawyer, 566), where the validity of an Oregon State statute prohibiting the employment of Chinese laborers on public works was called into question on the ground that it interfered with the privileges guaranteed to the Chinese by treaty provisions. On this point the Court said:

So far as this court and the case before it is concerned, the treaty furnishes the law, and with that treaty no State or municipal corporation thereof can interfere. Admit the wedge of State interference ever so little, and there is nothing to prevent its being driven home and destroying the treaty and overriding the treaty-making power altogether.

Following these precedents, the provisions of the California Constitution of 1879, prohibiting corporations from employing Chinese labor, and the State statutes passed to carry such provisions into effect were declared void, because in violation of the treaty of 1868 with China, by the United States Circuit Court. (*In re Parrott*, 6

Sawyer, 349.) Mr. Justice Sawyer, delivering the opinion, reviewed the whole question of the treaty-making power, and, after citing Article VI. of the Constitution, said:

There can be no mistaking the significance or effect of these plain, concise, emphatic provisions. The States have surrendered the treaty-making power to the general government, and vested it in the President and Senate; and when duly exercised by the President and Senate, the treaty resulting is the supreme law of the land, to which not only State laws, but State constitutions, are in express terms subordinated. * * *

It is the declared duty of the State judges to determine any constitution or laws of any State contrary to that treaty, or any other made under the authority of the United States, null and void. National or federal judges are bound by duty and oath to the same conduct.

So, also, State laws prohibiting aliens, who could not be naturalized, from fishing in public waters were held void by the same court, as discriminating against the Chinese and in favor of other aliens, and therefore in contravention of the provisions in the treaty with China. (*In re Ah Chong*, 6 Sawyer, 451.)

A further application of the principles under consideration has been made in cases where the right of administration over estates of aliens dying here is secured to the consular representatives of the deceased alien's government by treaty with such government. The supremacy of such treaty provisions over State statutes conflicting therewith has been uniformly upheld in the New York State courts and in the courts of other States, and recently by the Supreme Court of Massachusetts, where the question was presented for the first time in the case of *M'Evoy et al. v. Wyman* (191 Mass. 276).

The deportation of United States citizens under extradition treaties is sometimes cited as a case in point, for although the deportation of aliens is within the powers of Congress and it has never been finally settled by the Supreme Court that a citizen cannot be deported under an act of Congress in the absence of an extradition treaty, yet in the matter of deportation a citizen stands on a widely different footing from an alien and the right of Congress to surrender a citizen except under the authority of a treaty may well be doubted. In this connection it is to be noted that Congress does not undertake to exercise such power in the absence of a treaty, and under the legislation adopted by Congress extradition is conditioned upon obli-

gations arising under extradition treaties. On the assumption, therefore, that Congress has not independent jurisdiction over the subject, the surrender of American citizens under the authority of extradition treaties supplemented by congressional legislation is an illustration of the extension of the jurisdiction of Congress in consequence of treaty provisions.

Other cases might be cited in which the application of these principles has been still further extended, but the foregoing cases abundantly prove that in matters concerning the international interests of the nation the treaty-making power reaches far beyond the jurisdiction of Congress in its relation to the so-called reserved powers of the States.

It is hereinabove shown that where treaties are not self-executing congressional action is necessary to carry them into effect before they address themselves to the judicial branch of the government, and in the cases then under consideration the term self-executing was considered only with respect to treaties dealing with the powers entrusted to Congress. In the cases now referred to the situation is reversed, for here the treaties under consideration deal with matters beyond the ordinary jurisdiction of Congress, and if such a treaty is not self-executing it is because its provisions are not sufficiently complete in themselves to be applied by the courts as a rule of law or themselves provide for subsequent legislation. In such cases the jurisdiction of Congress is enlarged to meet the requirements of the situation by the provisions of Article I., Section 8 of the Constitution empowering Congress to

make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof.

The objection which suggests itself that a roundabout way is thus furnished by which Congress may be empowered to take jurisdiction generally over all the otherwise reserved powers, is met by the underlying condition, which applies to all such cases, that the only matters which can be brought within the jurisdiction of Congress in this way by treaties are those directly concerning the international interests of the nation. The power of Congress to legislate in such cases is

fully sustained by the decision of the Supreme Court in the case of *Ross* (140 U. S. 453), which involved the right of the United States to establish consular courts in foreign countries under treaty stipulations and acts of Congress carrying them into operation.

So also in *Baldwin v. Franks* (120 U. S. 679) the Supreme Court held, Chief Justice Waite delivering the opinion:—

That the United States have power under the Constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exemptions guaranteed to them by this treaty, we do not doubt.

The treaty referred to was the Chinese treaty of 1880, Article III. of which provided that the United States government would exert all its power to devise measures for the protection of Chinese residing within the United States and to secure to them the same rights, privileges, immunities and exemptions as the subjects of the most favored nation enjoyed by treaty.

An interesting question arises as to how far the usual power of Congress to repeal laws made by treaty applies to treaty stipulations relating to matters beyond the ordinary jurisdiction of Congress. It has been shown above that where legislation is necessary to carry into effect such treaties the ordinary jurisdiction of Congress is extended for that purpose by the Constitution, and in such cases it would seem to follow, as a matter of course, that Congress is fully empowered to repeal, in its discretion, the legislation so adopted. Where, however, such treaty stipulations are self-executing and become effective as the supreme law of the land without the aid of legislation, then there is no legislation to repeal and the right of Congress to nullify the effectiveness of such treaties as laws rest on its general power to terminate treaties. Whether or not a treaty is in force is regarded, under the decisions of the Supreme Court, as a political question to be determined by the executive and legislative and not by the judicial branch of the government, and although a declaration by Congress that a treaty is terminated may not relieve the nation of its obligations under it as an international contract, yet such declaration is binding upon the judiciary and would effectively prevent the enforcement of such treaty as a law of the land.

The cases upholding in general the power to make treaties with re-

spect to all matters embraced within the enumerated or implied powers under the jurisdiction of Congress are not reviewed here, as they have no bearing upon the regulation by treaty of matters outside of congressional jurisdiction. In such cases no questions involving reserved powers or State rights are presented, and it seems unnecessary to make more than a passing reference to them. The only question there is as to the completeness of the treaty without concurrent action by Congress which has already been considered. If the treaty stipulations relate to matters which are within the powers of Congress and properly concern the international interests of the nation, the right to deal with them through the treaty-making power cannot be doubted.

It will be observed that in none of the cases above cited, in which the Supreme Court has sustained the power to regulate by treaty matters beyond the ordinary jurisdiction of Congress, have the privileges granted exceeded the mere removal of alienage disabilities, such removal being usually in exchange for reciprocal privileges, and in no instance have foreigners been placed upon a more favorable footing than nationals so far as the enjoyment of the privileges granted is concerned.

A different question, and one which has not as yet been passed upon by the Supreme Court, would be presented if aliens should be granted greater privileges than those enjoyed by citizens, or if international regulations should be adopted by treaty dealing with economic questions such, for example, as the universal improvement of labor conditions, or if regulations should be established by treaty in conflict with the police powers of a State, or, to put the extreme case, if the treaty-making power should be exercised to alienate a part or all of a State from the jurisdiction of the United States.

In all of these cases the suggested action of the treaty-making power would concern matters beyond the ordinary jurisdiction of Congress, and in each case such action would conflict with the so-called reserved powers of the States or the people; and although, in the absence of a direct ruling on such cases by the Supreme Court, it is impossible to say that the action of the treaty-making power would be sustained as establishing a "supreme law of the land" in all or any of the cases, yet the grounds and conditions upon which such

action could be sustained have already been indicated and may be briefly stated.

In order to justify the contemplated action of the treaty-making power in these cases, or in any others which might be suggested, it is necessary, as appears from the principles already established, that such action fall within the general scope and purpose of the Constitution with respect both to the nation and to the States, and it is also essential that it should accord with the underlying conditions inherent in the nature of the treaty-making power — namely, that it must be exercised “to promote the general welfare” of the American people and that the matters dealt with must directly concern the international interests or relations of the nation. If it appears that these requirements are fulfilled actually as a matter of fact, and not as a mere subterfuge for exercising the power, then in the light of the decisions of the Supreme Court above cited, sustaining the jurisdiction of the treaty-making power over some of the so-called reserved powers, it is difficult to assign any reasonable ground for denying it jurisdiction over the other so-called reserved powers in the cases suggested. It has already been argued that inasmuch as the reserved powers all stand on the same footing in their relation to the treaty-making power, and in view of the terms of the provision making such reservation of powers, the right to exercise jurisdiction over any of them implies the right to exercise jurisdiction over them all. The question of the police powers was left open as a possible exception, but no well-defined distinction can be drawn between the police powers and the other so-called reserved powers in relation to the treaty-making power, and no conclusive reason appears for making an exception of them in this connection.

As was said by Mr. Justice Swayne, in *Hauenstein v. Lynham* (100 U. S., at p. 489), with regard to the exercise of jurisdiction by the treaty-making power over certain of the reserved powers then under consideration, which applies equally to all of them:

If the national government has not the power to do what is done in such treaties, it cannot be done at all, for the States are expressly forbidden to “enter into any treaty, alliance, or federation.” Const., Art. I., Sec. 10.

It is hardly conceivable that the national government should find itself powerless to deal with any international questions requiring

adjustment by treaty. The United States Supreme Court has held, in far-reaching terms, that the jurisdiction of the treaty-making power extends to all the appropriate subjects of negotiation between nations, (*Holden v. Joy*, 17 Wall. 242; *U. S. v. 43 Gallons of Whiskey*, 93 U. S. 197; *Geofroy v. Riggs*, 133 U. S. 266, and *In re Ross*, 140 U. S. 463), and it must be remembered that the United States is a nation invested with all the usual powers of a nation in dealing with foreign governments. The position of the United States Supreme Court on this point has been stated as follows:

Chief Justice Marshall, in *Cohens v. Virginia* (6 Wheaton, at p. 414):

America has chosen to be, in many respects and to many purposes, a nation; and for all these purposes her government is complete; to all these objects it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The Constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States.

Mr. Justice Bradley, in *Knox v. Lee* (12 Wall., at p. 555):

The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state governments.

Mr. Justice Field, in the first of the Chinese Exclusion cases (130 U. S., at pp. 603, 606):

The United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. * * * For local interests the several States of the Union exist; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.

Mr. Justice Gray, in *Fong Yue Ting v. United States* (149 U. S., at p. 711):

The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international rela-

tions, and with all the powers of government necessary to maintain that control and to make it effective. The only government of this country, which other nations recognize or treat with, is the government of the Union; and the only American flag known throughout the world is the flag of the United States. The Constitution of the United States speaks with no uncertain sound upon this subject.

Mr. Justice Brewer, in *State of Kansas v. State of Colorado*, recently decided (May 13, 1907):

It is no longer open to question that by the Constitution a nation was brought into being, and that that instrument was not merely operative to establish a closer union or league of States. Whatever powers of government were granted to the nation or reserved to the States (and for the description and limitation of those powers we must always accept the Constitution as alone and absolutely controlling), there was created a nation to be known as the United States of America, and as such then assumed its place among the nations of the world.

In the light of these opinions it cannot well be denied that the treaty-making power is a *national* rather than a *federal* power, and this distinction measures the whole difference between its jurisdiction and the jurisdiction of Congress in relation of the so-called reserved powers. An illuminating contrast between this power of the nation to make treaties and the powers of the several branches of the Federal Government has recently been drawn by Mr. Root, in his address on "The Real Questions Under the Japanese Treaty," delivered before the American Society of International Law, as follows:

Legislative power is distributed: upon some subjects the national legislature has authority, upon other subjects the state legislature has authority. Judicial power is distributed: in some cases the federal courts have jurisdiction, in other cases the state courts have jurisdiction. Executive power is distributed: in some fields the national executive is to act, in other fields the state executive is to act. The treaty-making power is not distributed; it is all vested in the national government; no part of it is vested in or reserved to the states. In international affairs there are no states; there is but one nation, acting in direct relation and representation of every citizen in every state. Every treaty made under the authority of the United States is made by the national government as the direct and sole representative of every citizen of the United States residing in California equally with every citizen of the United States residing elsewhere. It is, of course, conceivable that, under pretense of exercising the treaty-making power, the president and senate might attempt to make provisions regarding matters which are not proper subjects of international agreement, and which would be only a

colorable — not a real — exercise of the treaty-making power; but so far as the real exercise of the power goes there can be no question of state rights, because the constitution itself, in the most explicit terms, has precluded the existence of any such question. (American Journal of International Law, Vol. 1, Second Quarter, p. 278.)

That the jurisdiction of Congress is not the measure of the extent of the powers delegated under the Constitution to the other branches of the United States Government is settled, beyond the possibility of question, in the case of *Kansas v. Colorado* (*supra*), recently decided by the Supreme Court, wherein a distinction is drawn between the extent of the jurisdiction of that court and the jurisdiction of Congress. It is there pointed out that all legislative powers granted to Congress by the Constitution are defined, but that there is no limitation or enumeration of the judicial powers granted, and that the entire judicial power of the nation is vested in the federal courts. The conclusion reached is, in the language of the opinion —

There may be, of course, limitations on that grant of power, but if there are any they must be expressed, for otherwise the general grant would vest in the Courts all the judicial power which the new nation was capable of exercising.

Applying this construction, the court there held that its jurisdiction extended to the settlement of an interstate controversy concerning matters which were beyond the jurisdiction of Congress.

The reasoning and conclusions of the court in that case on the extent of the judicial powers would apply with equal force to the treaty-making power of the nation.

The considerations hereinabove presented show the propriety, at least, if not the necessity, of interpreting the grant of the treaty-making power to the national government so as to extend its jurisdiction in proper cases over all the so-called reserved powers, and this is in accord with the rule laid down by Chief Justice Marshall, in *Gibbons v. Ogden* (9 Wheaton, at p. 187), that a liberal rather than a narrow construction should be placed upon the extent of the powers delegated under the Constitution. On this point he said:

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this

rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used is not extended to the powers which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. *The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee; but is an investment of power for the general advantage in the hands of agents selected for that purpose, which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.*

Although perhaps it is more in the line of persuasion than argument, it may not be inappropriate to call attention to the remarks of Mr. Justice Johnson, in delivering the opinion of the Supreme Court in the case of *Anderson v. Dunn* (6 Wheaton, at p. 226), in support of the proposition that the possession of power does not

necessarily imply its abuse, and that much must be left to discretion. He says:

The idea is utopian that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility, and stated appeals to public approbation. Where all power is derived from the people, and public functionaries, at short intervals, deposit it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger.

Moreover, the usual checks and balances on powers under the Constitution are not lacking here, and the possibility of any dangerous abuse of this power is largely removed by the necessity for the approval of treaties by the President and two-thirds of the Senators present, and by the condition imposed under the decisions of the Supreme Court that no treaty which is not self-executing can be put in effect without the consent of a majority of the House of Representatives, and by the further condition that every treaty, so far as it is a law of the land in distinction from a national obligation, may be repealed by congressional legislation.

CHANDLER P. ANDERSON.

THE SECOND PEACE CONFERENCE AT THE HAGUE

I. THE PROGRAMME

In his address to the First Peace Conference on May 20, 1899, President De Staal remarked:

The name "Peace Conference," which the instinct of the peoples, outstripping in this respect the decision taken by the governments, has given to our reunion, well indicates the essential object of our labors. The "Peace Conference" cannot fail in the mission incumbent upon it. It must produce from its deliberations a tangible result which the whole of humanity awaits with confidence.¹

Such was the keynote of the salutation with which doubt and pessimism were greeted upon their arrival at The Hague in 1899. Certainly, in 1907 the nations, after the impressive lessons taught by two terrible wars, whether anxious participants or silent witnesses, have a still more ardent desire for permanent peace, and the duty owed by the governments to humanity is not less solemn or less evident.

The deliberations about to begin at The Hague through the initiative of President Roosevelt and at the invitation of the Emperor of Russia concern every human being, without distinction of nationality. For the blind, fortuitous play of local interests and public passions which has thus far so largely affected and determined the history of the world it is proposed to substitute a calm examination of certain questions connected with future international action and development, and to control in some measure the impulses which underlie the relations of sovereign states to one another.

Avowedly, the movement begun at The Hague in 1899, and now to be carried forward to another stage, is an expression of the general conviction that war is an evil to be prevented if possible, and in any case to be mitigated.

What, then, is war? In its most abstract sense, it is a state of conflict in which adversaries endeavor to settle their differences by

¹ Conférence internationale de la paix. Première partie, p. 16.

inflicting mutual injuries upon each other. In its public and international sense, it is a state of conflict between sovereign powers in which appeal is made to the force of arms. Its apologists defend it as necessary for the defense of rights which would otherwise have to be sacrificed; as legitimate according to the immemorial usage of mankind; and as salutary in developing the strength and courage of a nation. Its adversaries condemn it as inflicting pain, suffering and death upon innocent persons; as resting upon the principle that might makes right; as in no respect adapted to determine a question of right and wrong; as a survival of primitive barbarism; as debasing rather than elevating in its effect upon the character of a nation; as entailing sacrifices of an oppressive nature, often out of proportion to the advantages obtained even in case of victory; and as sowing seeds of permanent ill feeling and provoking plans for future reprisal on the part of the vanquished.

By its apologists as well as by its adversaries war is regarded as a grave, if not an unmitigated evil, which is, in general, to be discouraged and if possible prevented. Upon this point there is practically no divergence of opinion. Those who advocate powerful military organizations and effective navies do so chiefly on the ground that these are the best guarantees of peace. Agreement is practically universal also that peace is not merely a negative notion, — the mere absence of war, — but that, as the fruitful source or favoring condition of every form of social progress and general prosperity, it may rightly be compelled, if necessary, even by armed force. Thus many of the most earnest pacifists are likewise pacificators, and admit the rightfulness and even the righteousness of a war against war.

Is war, then, like some other evils inherent in human nature, ineradicable? Sovereign states are, in their juridical relations, moral personalities, endowed with intelligence of their interests and with free volition in the pursuit of them. Is there any reason to believe that they will ever be more just, more unselfish, and more reasonable than the average of the human individuals who compose them? Is there a certainty that governments, however sagacious, prudent, and well-disposed, will ever, in the last extremity, be able to restrain those waves of national feeling which have so often and so fatally

plunged nations into war? The answers to these questions, to have any value, must be based upon a profound knowledge of the psychology of peoples. It is not surprising, therefore, that radical differences of opinion should exist upon this subject, and the danger of open antagonism resulting from this opposition of views in any diversified assembly of men, such as an international conference must necessarily be, is in proportion to the tenacity with which these views are held and defended.

The indispensable conditions for a successful consideration of the means of avoiding war are evidently an entire freedom from the spirit of dogmatism, toleration for the convictions and pretensions of others, perfect liberty of thought, studious courtesy of expression, and a sincere desire to unite with persons holding diametrically opposite opinions in reaching the greatest number of practical results likely to be beneficial to mankind. From the nature of the case, the conclusions of a Peace Conference must assume some form of compromise. The first fact to be recognized is that the chief cause of war is obstinacy in thought, opinion, and purpose, almost always sustained by a real or factitious conviction of duty. If a conference in the interest of peace is to bear wholesome fruit, the idea of uncompromising insistence upon previously elaborated conceptions has to be abandoned; and a new, if not a nobler, form of heroism has to be cultivated, — the resolution to live, and to let others live, for the greatest good that may be possible.

It is not intended to represent that ideals must be lowered, that convictions may not be expressed, or that they may not be urged by firm, clear, and cogent argumentation; but the militant spirit is not becoming in a plea for peace. Nor is it to be supposed that the impassioned eloquence which upon another occasion might prove triumphant in swaying an audience can be useful in deliberations where individual feelings really count for nothing, where conclusions must be reached by the determination of separate commissions, where unanimity is essential to success, and where the ratification of governments unaffected by personal influences is necessary to crown the completed work.

It is to be expected, therefore, that many noble aspirations and ingenious suggestions for promoting the peace of nations must fall

by the wayside, or await their opportunity at some future time. Unless the results finally attained are to be in sad contrast with the hopes excited, moderation must rule from the beginning; and even in the preparation of the programme much restraint must of necessity be exercised.

It is desirable, therefore, to dismiss the illusion that any possible Peace Congress is about to regenerate the world. Effective action, either within the nations or among them, must be slowly prepared for by the growth of public opinion; and it is not credible that this can be equally advanced in any direction in all countries. As, by the very nature of sovereignty, sovereign states have no superiors entitled to impose upon them laws, decisions, or policies without their free consent, each government must freely judge for itself what changes it can make in harmony with its safety and its interests; and it is certain that some governments do not regard themselves prepared for those decisions which others may consider desirable or imperative for themselves. Responsible statesmanship, even with the best intentions, can, therefore, advance only with unequal steps. What is of chief importance is that all should march in the same direction.

There must, therefore, be a wide disparity between the realizable results of the coming Peace Conference and the counsels of perfection; and for this all thoughtful men should be prepared. The theorist, who is usually also an enthusiast, should remember that it is not yet three hundred years since Grotius in his great work laid the foundations of international jurisprudence, and that the structure is still far from completion. He should remember also that such international law as we now possess has been elaborated by a slow historic process, and that it is the result of long and often bitter experience. Such as it is, like every other form of useful law, it is the product of social need. It has been built up little by little, much after the manner of a coral island, by gradual accretion. In the whole history of international relations, there are but few changes that have not come about by a process of evolution correlative to the general social advance.

For the recognized evil of war there is, perhaps, no single panacea. The most solid hope lies in the growing moral consciousness of

modern civilized nations in connection with the general realization of the enormous burdens which modern warfare both on land and sea imposes upon both belligerents and neutrals. Finance has become international, and with commerce is exposed to incalculable risks by the fact and sometimes even by the rumor of war. All the intelligent interests of the people of all countries are against it, and this is the chief guarantee of peace.

Theoretical expedients for the total prevention of war still continue to be discussed, but no serious thinker places great reliance upon their efficacy. The simplest and the oldest is, of course, the universal state. This was the policy of Rome in the days when the *Pax Romana* extended over nearly the whole of civilization and embraced large parts of three continents, and its restoration was the dream of the Middle Ages, inspired by the unity of the Christian faith, which aimed to include all mankind within its fold. The effort to establish a universal empire runs through the whole of the history of Europe until the triumph of territorial sovereignty in the Peace of Westphalia, and has always played a large rôle in European diplomacy as an aspiration or a dread.

The unitary universal state having been found impossible of realization, the idea of federation, or the formation of a great composite legislative and judicial organism above the individual states was proposed, first by Emeric Crucé,² afterward by the Duke of Sully,³ William Penn,⁴ the Abbé Saint-Pierre,⁵ and others, and has been recently advocated by Lorimer,⁶ Bluntschli,⁷ Malardier,⁸ Novicow,⁹ and Stead.¹⁰ Even some of those who regard the creation of such

² *Nouveau Cynée, ou discours d'estat représentant les occasions et moyens d'establisir une paix générale et liberté de commerce, etc.*, Paris, 1623.

³ *Mémoires des sages et royales oeconomies d'Estat*, Amsterdam, 1638.

⁴ *An Essay toward the Present and Future Peace of Europe by the Establishment of a European Dyet or Parliament of Estates*, London, 1693.

⁵ *Projet de paix perpétuelle*, Utrecht, 1713.

⁶ *Institutes of the Law of Nations*, Edinburgh, 1883; and article on *Le problème final du Droit International* in the *Revue de Droit International et de Législation Comparée*, IX, pp. 161 *et seq.*

⁷ *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*, Zürich, 1868; and Lardy's French translation, Paris, 1869.

⁸ *Solution de la question européenne*, Paris, 1861.

⁹ *Die Föderation Europas*, Berlin and Berne, 1901.

¹⁰ *The United States of Europe*, London, 1899.

artificial political organizations as chimerical find a solution in joint international action of an analogous kind. Thus the Italian jurist Fiori,¹¹ who, although he has himself prepared an international code of his own doctrine, thinks general legislation undesirable, proposed that existing international law be formally recognized by a congress of jurists representing the great powers, that these powers act as mediators among the nations, that a superior court be charged with the duty of determining the rights of litigant states, and that an international army be organized to execute the sentences of the court. The German jurist Holzendorff,¹² while opposing a universal application of identical principles of international law, which he deems impracticable on account of the diversity of civic development in different parts of the world, advocates a league of the states which have arrived at a certain stage of civilization for the purpose of imposing general peace.

Still others, such as the late David Dudley Field,¹³ as well as Bluntschli, and the members of the Association pour la Réforme et la Codification du Droit des Gens¹⁴ have thought that international justice would be promoted by a formal codification of the recognized principles of the laws of nations. Many jurists have, however, opposed this idea, partly on the ground that no general code could be adopted to the use of all nations, but chiefly because they consider that it would arrest the spontaneous development of the rules of law that might otherwise be carried forward. It is further believed by competent judges that the various ratifying assemblies of the different nations would not be disposed to accept an identical body of legal doctrines such as a formal code would necessarily comprise.

In general, there exists among jurists a profound distrust of all artificial organizations and formulas of legal doctrine.¹⁵ Attention has also been called to the perils and commotions that would arise from the attempt to lodge authority in the hands of any central

¹¹ *Le Droit international public suivant les besoins de la civilisation moderne*, Milan, 1865.

¹² *Handbuch des Völkerrechts*, Berlin, 1885. Introduction.

¹³ *Draft Outlines of an International Code*, New York, 1872.

¹⁴ Founded in 1873. Since 1895 called *Association de Droit International*.

¹⁵ See Bonfils, *Manuel*, ed. of 1905, pp. 891 *et seq.*

power tending toward the transformation of the international community into a single state, whether monarchical or republican in form. Such centralization, according to De Martens, would involve a "complete change of the map of Europe, or the submission of independent countries to a common superior power."¹⁶ It is not believed that such a sacrifice of sovereignty would be endured. When it is remembered through what trials the unity of Germany and the unity of Italy have been effected, it is not considered probable that the "United States of Europe" is likely to emerge from a congress of jurists or diplomatists representing the existing governments. But even were this project nominally realized, it may be asked, What security would be offered against civil wars?

There is, no doubt, a growing tendency among civilized nations to exercise good faith in the observance and execution of treaties and conventions; and it is often suggested that sovereign states, being free and independent, are capable of doing whatever they agree to do. As their power is unlimited, it is sometimes argued that the representatives of sovereign states have only to meet together and make solemn engagements, in order to abolish war with all its attendant evils. Besides the primary difficulty, which every government comprehends, of binding a nation beyond its immediate interests, there is, however, the further one of giving or obtaining guarantees that such engagements will be kept when those interests are believed to be menaced. That which has been most effectual in securing respect for treaty obligations is the fact that they have, in recent times, not been lightly entered into, but have been assumed with a clear comprehension of definite advantages to be derived from them. In this respect contemporary diplomacy stands in marked contrast with that of an earlier time, when international promises were made and broken in a day. The ancient doctrine that a treaty is valid so long as the conditions remain unchanged, — *rebus sic stantibus*, — however, still represents a principle of great practical importance. It cannot be doubted that any existing sovereign state would feel free to disregard a treaty which bound it to action plainly contrary to its honor or its interests. It is esteemed useless, therefore, for the sake of some temporary, but ultimately illusory, triumph of inter-

¹⁶ F. De Martens, *Traité de droit international*, I, ch. I, 51.

national ideals, to enter into solemn engagements to do or to refrain from doing those things which compelling circumstances might force a government to disregard. It is better for international morality and for the progress of jurisprudence that promises be not made which are in grave danger of being broken. A wise statesmanship will not, therefore, pledge itself to what in its own estimation it is impossible to perform; and it will not lightly sacrifice those prerogatives of freedom and independence which confer such high responsibility upon a sovereign state.

For these reasons subjective theorists will look in vain for startling topics and revolutionary schemes in the official programme of the Second Peace Conference at The Hague. It is an indispensable preliminary to any international conference whatever that the field of discussion should be limited to those subjects which it is deemed practicable to consider. If this precaution were not taken, the governments would not send representatives; and, if an attempt should be made to extend the range of discussion unduly, the purposes of a friendly interchange of views and intentions would be defeated in advance.

We turn, then, with intense interest to consider the scope and specifications of the official programme of the Second Peace Conference at The Hague, as indicating the topics which the various governments have agreed may at this time be discussed with profit. These may be grouped under the six following heads:—

- I. Arbitration and International Commissions of Inquiry;
- II. Laws and Customs of War on Land;
- III. Laws and Customs of Maritime Warfare;
- IV. The Private Property of Belligerents at Sea;
- V. The Rights and Duties of Neutrals at Sea; and
- VI. The Adaptation of the Principles of the Geneva Convention to Maritime Warfare.

It has been remarked, and in many quarters not without regret, that, with the exception of the first general topic, all the questions to be discussed arise out of the assumption that war is in some cases inevitable and will in the future occur. At first glance this may seem to justify the inference that the coming Conference is con-

cerned with War rather than with Peace, and that it affords little hope of accomplishing more than a slight mitigation of the barbarities of warfare.

It is only from a superficial point of view, however, that this conclusion can be drawn. The fact that nearly all the governments in the world are agreed to send representatives to discuss these questions is conclusive evidence that war is universally considered an evil that needs to be placed under restriction and to be regulated by principles of justice, equity, and humanity. Individuals may scoff at the efforts to promote peace and restrict and ultimately abolish war, but no civilized government is disposed to treat the subject with contempt. All are agreed that the community of human interests is sufficiently strong to justify a common attempt to remove as far as possible the necessity of war and to limit its area, its mode of procedure, and its consequences by pledging themselves to the observance of prescribed rules based on just principles. This is, in effect, to adopt the standards of jurisprudence as the true guide in international relations, instead of asserting the right of superior force to dominate. Once accepted, it renders war illogical and places every belligerent nation in the position of an offender against mankind as a disturber of the peace, unless it can show good and sufficient cause for its employment of armed force.

But the pacific purpose of the coming Conference is specifically announced in the first topic of the official programme, —

Improvements to be made in the provisions of the Convention relative to the peaceful settlement of international disputes as regards the Court of Arbitration and the international commissions of inquiry.

Thus, at the very outset, the Second Conference declares itself the continuation of the First, and purposes as its primary object the further development of the engagements that have been already solemnized. Without assuming that it will be able to abolish war, it aims directly at the removal, as far as possible, of its causes; and prudently provides for diminishing the evils that may yet result, if it is still found to be inevitable.

It is no slight augury of its substantial usefulness that the Second Peace Conference bases its right of existence and its expectation of success upon the solid ground of experience rather than upon untried

aspirations. It was in the midst of much doubt and in the presence of no inconsiderable opposition that the First Conference accepted the idea of a permanent tribunal for the settlement of international disputes. A few distinguished jurists had expressed their approval of such a tribunal, but only for special and previously determined subjects. Among these were the Russian publicist Bulmerineq, the Prussian jurist Holtzendorff, and the English professor Travers-Twiss. Another Russian, Count Kamarowsky, had made an extended plea for a general permanent tribunal,¹⁷ but was generally deemed to have failed in justifying his proposal on account of the grave difficulty of finding impartial judges and of devising an effective form of sanction. The weight of expert opinion previous to the Conference was that the idea of a permanent tribunal was chimerical. It was only after it was apparent that the Conference would end in total failure unless some decided step were taken, and as the result of strenuous exertions, that the creation of a permanent tribunal, — or more strictly a potential tribunal to be brought into actual existence in case of need, — was finally found to be possible. The Convention for the Pacific Settlement of International Disputes of 1899 was the offspring of psychological conditions that could not have been foreseen, that have not yet been fully analyzed, and whose complete history has not yet been and should not now be written. The work done at that time constitutes the most notable and enduring single triumph of human reason of the nineteenth century. It has been applauded, ridiculed, and misunderstood to a greater degree, perhaps, than any other public act; but it has left a mark that can never be effaced, and has already borne fruits that will not die.

The permanent tribunal has had few cases, the provisions for mediation have not been applied as was intended, and two great wars have occurred which the public vaguely imagined might have been prevented. All this is true, and yet it is as unreasonable to condemn the work of the First Conference as it would be to find fault with the moral law. The Convention of 1899 not only created a permanent tribunal, it provided that

Powers, strangers to the dispute, have the right to offer good offices or mediation, even during the course of hostilities;

¹⁷ *Le Tribunal international, Paris, 1887.*

and declared,

The exercise of this right can never be regarded by one or the other of the parties in conflict as an unfriendly act.¹⁸

It was as the result of action under this article of the Hague Convention that the Peace of Portsmouth between Russia and Japan was concluded on September 5, 1905.¹⁹ It was also under the provisions of Articles IX-XIV that the International Commission of Inquiry brought to a satisfactory conclusion the North Sea incident, which threatened for a time the good relations of Russia and England.

It is, however, in the impetus given to the principle of judicial settlement of international disputes that the First Hague Conference may discern its greatest triumph. In the first four years of the twentieth century, sixty-three disputes were referred to judicial settlement.²⁰ At the Conference of American States of 1901 a convention, since ratified by five states, was concluded for the pacific settlement of pecuniary claims; and this has been renewed at the Conference of 1906, with the expectation that it will be ratified by all the American republics.²¹

The Bureau of the Administrative Council of the Permanent Court of Arbitration at The Hague has registered thirty-three separate treaties of obligatory arbitration between different powers.²² These may be divided into five classes as follows:

I. General treaties of arbitration framed on the same model, submitting to *obligatory* arbitration differences of a judicial kind or relating to the interpretation of treaties between the two contracting parties which may arise between them and which cannot be settled by diplomatic means. Two exceptions only are stipulated in these treaties: (1) differences which involve the vital interests, the independence, or the honor of the contractants; and (2) cases where the

¹⁸ Article III of the Convention for the Pacific Settlement of International Disputes.

¹⁹ See Hershey, *The International Law and Diplomacy of the Russo-Japanese War*, New York, 1906.

²⁰ See Darby, *Modern Pacific Settlements*, London, 1904, pp. 134, 151.

²¹ Report of the Third Conference of the American States, Washington, 1907.

²² Rapport du Conseil Administratif de la Cour Permanente d'Arbitrage, The Hague, 1907.

interests of third powers are involved. These eighteen treaties are the following:

1 France and Great Britain.....	Oct.	14, 1903
2 France and Italy.....	Dec.	25, 1903
3 Great Britain and Italy.....	Feb.	1, 1904
4 Spain and France.....	Feb.	26, 1904
5 Spain and Great Britain.....	Feb.	27, 1904
6 France and The Netherlands.....	Apr.	6, 1904
7 France and Sweden and Norway.....	July	9, 1904
8 Germany and Great Britain.....	July	12, 1904
9 Great Britain and Sweden and Norway...	Aug.	11, 1904
10 Great Britain and Switzerland.....	Nov.	16, 1904
11 Great Britain and Portugal.....	Nov.	16, 1904
12 Italy and Switzerland.....	Nov.	23, 1904
13 Austria-Hungary and Switzerland.....	Dec.	3, 1904
14 France and Switzerland.....	Dec.	14, 1904
15 Austria-Hungary and Great Britain.....	Jan.	11, 1905
16 Great Britain and The Netherlands.....	Feb.	15, 1905
17 Denmark and France.....	Sept.	15, 1905
18 Denmark and Great Britain.....	Oct.	25, 1905

II. A general treaty between Spain and Portugal of May 31, 1904, submitting to *obligatory* arbitration all differences of a judicial kind or relative to the interpretation of treaties, with the exception of those involving the vital interests, the independence, or the honor of the contractants. This treaty differs from those of Class I in that the subject of litigation between the contractants, after the failure of diplomatic means, shall first be submitted to a special Commission; and, if this expedient also fails, shall then be submitted to arbitration.

III. Special treaties for the *obligatory* arbitration of differences arising from the interpretation of treaties and pecuniary claims, with the same exceptions as Class I. These six are the following:

1 Belgium and Russia.....	Oct. 30/17,	1904
2 Belgium and Switzerland.....	Nov.	15, 1904
3 Belgium and Sweden and Norway.....	Nov.	30, 1904
4 Belgium and Spain.....	Jan.	23, 1905
5 Belgium and Greece.....	Apr. 19/May	2, 1905
6 Belgium and Denmark.....	Apr.	26, 1905

IV. General treaties for the *obligatory* arbitration of *all differences*, except those reserved in Class I. The treaty between Norway

and Sweden stipulates that the Permanent Court of Arbitration shall decide *whether or not* the vital interests of either party are involved. These six treaties are the following:

7 Sweden and Norway and Switzerland....	Dec.	17, 1904
8 Sweden and Norway and Russia..	Dec. 9/Nov.	26, 1904
9 Sweden and Norway and Spain.....	Jan.	23, 1905
10 Norway and Sweden.....	Oct.	26, 1905
11 Denmark and Spain.....	Dec.	1, 1905
12 Denmark and Russia.....	Mar. 1/Feb.	16, 1905

V. Two treaties stipulating *obligatory* arbitration between the two contractants for *all differences, without exception*:

1 Denmark and the Netherlands.....	Feb. 12, 1904; and
2 Denmark and Italy.....	Dec. 16, 1905

The facts above cited show a steady growth of public opinion and of governmental confidence in many different countries in the direction of favoring the obligatory arbitration of international disputes. The reservations are, in most cases, still considerable, for each sovereign power is left free to determine what may affect its sovereign interests. It is at this point that the provisions for international commissions of inquiry becomes of value, for such commissions may determine whether or not an alleged grievance is real or imaginary. It is in no sense a derogation of the dignity of sovereignty to submit to an impartial inquiry regarding the reality of an alleged but disputed state of fact.

Without dwelling upon the remaining items of the official programme, — such as the formalities to be observed regarding the opening of hostilities, the rights of neutrals on land, the modification of the Declarations of 1899, the bombardment of ports and defenseless cities, the laying of mines and torpedoes, the transformation of merchant vessels into warships, the exemption from capture of the private property of belligerents at sea, the duration of port privileges to merchant vessels after the opening of hostilities, the rights and duties of neutrals at sea, the thorny subject of contraband, the rules to be applied to belligerent vessels in neutral ports, the destruction of neutral vessels taken as prizes with the whole question of prize law, and the further extension of the Geneva regulations, all of which are of great interest and importance, — we may briefly

consider two of the topics omitted from the programme which have, nevertheless, been proposed for discussion.

The limitation or reduction of armaments, — frequently but awkwardly expressed by the word "disarmament," — is a subject of high moral and economic interest, and was in principle commended by a resolution of the First Hague Conference; but, unfortunately, this subject embraces such a mass and variety of specific problems that it has hitherto seemed practically unapproachable. The most useful aid to a profitable consideration of this question would probably be a definite and specific offer on the part of one of the great powers to make a real renunciation of its military strength, — a proposition to discontinue at a given point the augmentation of its army or navy, or to reduce them to a fixed number of units of strength. Until this is done, and done in good faith, it will, perhaps, be difficult to do more than to speak in general terms, with the grave possibility of incurring criminations and recriminations which might not prove conducive to the promotion of peace. If several armed men were assembled together with suspicions of one another's intentions, the example of laying down one's arms would probably be much more effective than an argument as to the caliber of their revolvers. In a matter so closely related to action, it is difficult to see that anything short of action would inspire confidence. It appears, therefore, that, if disarmament in any of its senses is to be realized, it must begin with a definite resolution to abandon the resort to force, and to substitute for it an appeal to reason and good faith.

PRACTICE IS BETTER THAN PRECEPT

It must not be overlooked, however, that the discussion of the subject of disarmament or of the limitation of armaments has great educational value and importance. Standing armies and navies are justified on the ground of necessity and as essential to national existence. It is also stated that the armies and navies, however valuable in themselves from the point of view of discipline, are not ends but means to an end, namely, the establishment and maintenance of peace. Force produces peace by subjecting the weak to the will of the strong, but if peace may result from an appeal to reason as

well as from the sword, it follows that force should be used only when reason fails. The only way to determine when one method or the other is adapted to a desired end, is to discuss both the end and the means. The statement that large and powerful armaments are necessary is undoubtedly sincere, but the doctrine may nevertheless be false. If questioned it must be defended, and it frequently happens that the very weakness of the defense overthrows a doctrine which if unquestioned would have commanded respect and acquiescence. The discussion of the necessity or uselessness of large armaments would bring into view the various and contending arguments by which the use of force is to be supported or rejected and lead to a clearer understanding of the ways and means whereby peace may be established and safeguarded. No human institution is too sacred for discussion and if any institution fails to convince the enlightened judgment of men it cannot long endure. Silence is not argument and a refusal to discuss a question cannot prevent others from weighing and testing it in the light of reason. Force has controlled the actions of men and nations since the beginning of time, but it cannot be said that its success has been such as to exclude the hope of a substitute.

Far more promising than any general project of disarmament, therefore, is the determination not to employ armed force wherever justice may be secured without it; and when that conception is fully analyzed, it may become clear that armed force has no reason for existence among civilized nations except to suppress wrong. The most effective method of securing ultimate disarmament is, therefore, to promote international justice by applying judicial procedure between nations to such an extent that, as in every well organized state, force will become merely the instrument for obtaining obedience to law.

We are thus brought to consider another topic which has been proposed for discussion at the Second Hague Conference, but which has not been included in the official programme; namely, the question whether or not armed force should be employed to compel the payment of contract debts by sovereign states.

The subject is one which has many aspects, and at the present moment suffers from the embarrassment of being to an almost in-

credible extent misunderstood. General interest in the subject dates from the letter of Dr. Drago, then Argentine Minister of Foreign Affairs, written on December 29, 1902, to the Argentine Minister at Washington. In that letter Dr. Drago maintains that armed force should not be employed by one government to compel the payment to its citizens of public debts owed to them by another government.²³ As the traditional practice of the United States has always been in conformity with this idea, in its official instructions to its delegates to the Third International Conference of American States held last year at Rio, the Government of the United States declared:

It is doubtless true that the non-payment of public debts may be accompanied by such circumstances of fraud and wrong doing or violation of treaties as to justify the use of force. This Government would be glad to see an international consideration of the subject which shall discriminate between such cases and the simple non-performance of a contract with a private person, and a resolution in favor of reliance upon peaceful means in cases of the latter class.²⁴

On the ground that most of the American countries are still debtors, while the European countries are creditors, it was felt by the Government of the United States that the Conference at Rio should not undertake to resolve upon a rule or attempt a discrimination, since such action would have the appearance of a meeting of debtors resolving how their creditors should act. The true course, it was believed, was to request the Second Hague Conference, where both creditors and debtors will be assembled, to consider the subject. Accordingly, in preparing the official programme for the Conference at Rio the fourth topic consisted of a resolution recommending

that the Second Peace Conference at The Hague be requested to consider whether, and if at all to what extent, the use of force for the collection of public debts is admissible.

The delicacy of feeling and the practical wisdom of the American States are shown in the report of the Committee to which this resolution was referred at Rio, which says:—

It was not proposed that definite conclusions should be reached at this Conference, composed exclusively of American nations, but that the

²³ See *Foreign Relations of the United States for 1903*, p. 1.

²⁴ See *Report of Third Conference of the American States*, p. 42.

true principles that should govern such cases should be left to be fixed by an international assembly composed of all the nations of the world.

But even this modest proposition was not adopted. In a spirit of extreme moderation the Committee recommended and the Conference adopted a resolution leaving to each Government the propriety of

inviting the Second Peace Conference at The Hague to consider the question of the compulsory collection of public debts, and, in general, means tending to diminish between nations conflicts having an exclusively pecuniary origin.²⁵

Notwithstanding all these amenities, the attitude and purposes of the United States and of the other American States are so seriously misapprehended that a European publicist has recently felt called upon to declare:

The Monroe Doctrine is interpreted in this sense, — that Europe cannot enforce its rights acquired in America, even in case of a grave violation. In this fashion the protectorate of Monroe would deliver letters of marque to the adepts of the Doctrine of Drago.²⁶

If proof were needed to show that the so-called Drago Doctrine should be discussed at the Second Hague Conference, such a misapprehension of the attitude and purposes of the United States regarding it would be a sufficient argument. Is it not a reasonable proposition that debtor and creditor nations should meet together, without the exasperation of immediate grievances, to discuss a question of such grave importance?

Even the critic of the Drago Doctrine just cited appears to think so, and with fervid argument he pleads for the assimilation of international debts to international conventions, thus placing international contracts under the protection of international law.

The plan proposed by him for accomplishing this result, so far as public loans are concerned, is as follows: —

Every loan shall be the object of a preliminary agreement between the state which borrows and the state where the emission of credit takes place;

²⁵ See Report, p. 14.

²⁶ Daehne van Varick, *Le Droit Financier International devant la Conférence de la Haye*, The Hague, 1907, p. 21.

The emission shall require the authorization of the government of the state where it shall take place;

The minister of foreign affairs of the said state shall represent the creditors in case of the non-execution of the contract;

The debtor state shall be answerable before the courts of the state where the public emission shall have taken place, and the judgments of the said tribunals shall be executory in the country of the debtor;

The non-execution of these judgments shall involve the closing of the financial markets to the insolvent state, and, also, eventually, the suspension of the treaties of commerce concluded with it.

It is unnecessary to comment upon the details of this project, — which would hale a sovereign power before a foreign domestic court, — but it shows that, from quite opposite points of view, there is a lively interest in the international status of public obligations of an international character, as has been made evident by the elaborate work of Lewandowski on this subject. On the one hand, there are the interests of prudent people who invest their savings in securities based on contracts with governments; on the other, there are those of equally innocent persons who are exposed to the peril of the bombardment of their ports and their homes, the risk of subjugation, and the extortion of vast sums for which they have no legal or moral responsibility. In the indictment against the debtor states these are represented as often "*peu scrupuleux*" in the fulfilment of their engagements. What, then, is to be said of creditor states whose armies and navies are sent abroad to enforce the payment of debts alleged to have been incurred under contracts with private persons who demand one hundred units of return for thirty or fifty units of service rendered? Is it not worthy of consideration that a "contract" is not a unilateral transaction in which wrong is imposed upon the defenseless by a superior power, but a voluntary and reciprocal agreement in which there is always an expectation of profit or advantage, with previous knowledge of the risks involved? If it is unscrupulous for the weak government to repudiate its contract debts, is it less so for a powerful government to employ its public armed force to compel the payment of private claims without a previous hearing in any court? Are not such contentions, if worthy of governmental notice, proper subjects of adjudication by a neutral

and international tribunal? If not thus adjudicated, they must be pressed upon *ex parte* evidence, and without a fair examination. Under the protocol of one of the mixed claims commissions of 1902, the claimants demanded \$8,100,000; and received by the awards of the Commissioners only \$668,000, or less than one-twelfth of the sum demanded!²⁷ In another case \$418,881 was awarded and claims for \$998,000 were rejected. In another case £66,238 was allowed in awards by agreement, claims to the amount of £1,296,419 were referred to the Umpire, and of this sum £120,000, or less than one-tenth, was finally allowed by him.²⁸

Without assuming the absolute correctness of these awards, it is evident that such results demonstrate the enormous risk of flagrant injustice in employing the armed forces of a sovereign state in the collection of international claims without previous resort to judicial methods in determining the equities involved. There is no nation that would not feel the shame and humiliation of such an exercise of arbitrary power if applied to itself, or the loss of dignity and self-respect on the part of its own government in thus extorting the payment of unfounded claims in behalf of their fellow citizens from a feebler nation. When it is added that such methods of procedure may easily furnish the excuse for unwarranted political intervention, and become the occasion of serious complications between different powers in defending the pretensions of their subjects or citizens, it is apparent that it may give rise to even greater evils than the immediate violation of equity. It cannot be doubted that after public attention has been sufficiently directed to this subject the statesmen of all nations will recognize the importance of an international agreement regarding it. Whatever may ultimately be found to be the best method of enforcing the payment of such debts, when their reality, nature, and amount have been judicially determined, it is evident that no merely pecuniary claim should ever be enforced without previous judicial examination before a neutral tribunal, and that this whole class of international differences may properly be referred to arbitration.

It is interesting to note that the Second Peace Conference at The

²⁷ See Balston's Report. Washington, 1906.

²⁸ See Darby, *Modern Pacific Settlements*, p. 143.

Hague, as indicated by the official programme, will be almost entirely of a juristic character. It will differ from all non-official congresses of jurisprudence, however, in being a political conference so far as its authority is concerned. It will thus celebrate the happy marriage of juristic science and governmental sanction, and the full meaning of this for the progress of civilization should not be left in obscurity. Hitherto, in their various scientific institutes and associations, jurists have been striving to work out abstract problems of international justice with slight practical encouragement on the part of the governments. Now the jurists and the diplomatists are to work together under the direction of the governments, and with their authority, for the perfection of positive law to be sanctioned by solemn conventions. This is the really encouraging feature of the international movement initiated at The Hague. However much or however little may be accomplished at this time, the vital point is that the movement thus begun shall not be arrested. If it is to be solidly enduring, it must not attempt too much at one time. The chief aim of jurists and the lovers of peace throughout the world should be to encourage the perpetuation of the one agency which can most effectively substitute judicial procedure for military action in the settlement of international disputes. The *point d'appui* offered by the existing Hague Conventions is the one real and definite ground of hope that this result may gradually be accomplished. If the conference can be made periodic, the tribunal placed above all national politics, and a determination reached to refer to it all questions of a purely juridical nature, that will have been done for the society of nations which has already been done in every well ordered state for its individual citizens.

The fundamental difficulty in realizing this ideal is the absence of faith in the decisions which such an international court might render. The same human deficiencies and imperfections that embarrass the adjustment of international disputes by diplomatic procedure tend to prevent their settlement by judicial methods. It is not unnatural that sovereigns and ministers of State should have more confidence in their own sense of justice than in the decisions of strangers, each of whom may be influenced by considerations of personal interest or national policy. What is most needed, therefore, to crown the system

of arbitration is a tribunal above reproach or suspicion, — a body of men rendered superior to self-interest in their decisions by ample remuneration, security of position, and the sense of professional responsibility.

Personal honor and integrity are the pride and characteristics of an independent judiciary. These, however, are not the qualities most difficult to secure in an international tribunal; for international jurisprudence is a field apart, and its requirements are *sui generis*. The ideal international judge would be a man with the habit of mind of the jurist and the accomplishments of a trained diplomatist, — a combination that is difficult to find. He should have the training that forms the mind of the lawyer, without being fettered by the technicalities of any form of municipal law or procedure. He should have the intimate knowledge of international relations of the accomplished diplomatist, without the spirit of intrigue and temporary compromise. A natural sense of equity, total freedom from national prejudice, and innocence of mind as respects technicalities, combined with independent creative intelligence in applying the norms of international conduct, are qualities that would be immensely serviceable in rendering decisions that would stand the test of time and be adapted to become the source of universal doctrines; for it must be remembered that, in the absence of codes and statutes and even of sound precedents, the international judge must become the chief factor in the further development of international law. Nor would the philosophical jurist, disposed to apply to international relations a rigid preconceived system, be more acceptable than the technical lawyer or the mere diplomatist; for international development follows its own laws, which cannot be set aside by any theory. The problem that seems so simple to the superficial observer deepens as we attempt to solve it; and we find ourselves confronted with forces, psychological as well as material, that conform to no man's will and follow the direction of no man's thought. When all the nations have consented to settle their disputes by judicial methods and the most perfect conceivable international tribunal has been organized, there will still remain to be solved the perennial problem of justice, — the most august, the most pressing, and the most difficult of all the tasks intrusted to mortal men.

DAVID J. HILL.

STATE LOANS IN THEIR RELATION TO INTERNATIONAL POLICY¹

The Argentine Republic, like all America, was deeply moved by the military steps taken by England, Germany and Italy in the month of December, 1902, against Venezuela for the settlement of claims of various sorts. Among these claims, arising some from special contracts and others from material injuries sustained by the subjects of the nations mentioned in the revolutionary commotions and civil wars of the unfortunate Republic, was made to figure the collection of the deferred interest on the foreign public debt, outstanding in the form of bonds issued by the Venezuelan government for the construction of railways and other public works. The coercive measures adopted assumed at one time a character of extreme violence, the Powers going so far as to seize the Venezuelan fleet, bombard the cities of La Guerra, Puerto Cabello and Maracaibo and establish a rigorous blockade of the coast.²

It was at this moment of veritable consternation for America that the Argentine Republic sent to its Minister in Washington the note of December 29, 1902, that has given rise to most important controversies and debates, which now, after the lapse of so long an interval, are far from exhausted.³

That document had for its principal object to call the attention of the government of the United States to the menace to the peace and security of this continent that was involved in the conduct of the

¹ This article is translated from the Spanish.

² The antecedents in fact and the diplomatic negotiations that originated the Venezuelan conflict can be studied in Drago's "La Republica Argentina y el caso de Venezuela," page 312 *et seq.*, where the documents published officially in "Papers Relating to the Foreign Relations of the United States," 1903, are reproduced.

³ The Argentine note is found in Drago's "La Republica Argentina y el caso de Venezuela," Buenos Aires, 1903; Drago's "Cobro Coercitivo de deudas publicas," Buenos Aires, 1906, and in "Papers Relating to the Foreign Relations of the United States," 1902.

Powers engaged in the Venezuelan campaign, which Powers had consulted that government before undertaking it. Though essentially diplomatic in character, the Argentine note briefly discussed the principles that pertained to the forcible collection of public debts arising from government loans.

I.

The pecuniary claims of one state against another may technically be grouped in various classes according to their origin. Some times they arise from crimes or offenses and from injury or prejudice sustained by the subjects of one nation and emanating from the illegal act of the government or citizens of another; or they may be the result of purely contractual obligations between the subjects of the claimant country and foreign authorities. The constitution and local laws of the different states, the organization and mechanism of its judiciary determine the form of procedure to be followed in every case, there being but a single rule as yet admitted in international law, to wit: that local remedies must be exhausted in the case of contracts, real or implied, and crimes before recourse may be had to action through diplomatic channels. And some times even in this respect concessions have to be made in the interests of peace and international harmony. "It is clearly absurd," said Lord Salisbury, "to lay down that every state with which you have dealings shall come up to your own standard in the certainty and promptitude of the punishment of crime."⁴

In regard to purely conventional obligations the subjects of a country that make contracts with a foreign government enter into definite relations to it, in respect of the properties in question, which creates perfectly defined reciprocal obligations. The government in this case acts as an ideal or judicial person, competent to assume the bond which it thus takes upon itself. It does not in reality act in its character of a sovereign power, but as a party to a bi-lateral

⁴ Essays by the late Marquis of Salisbury. *Foreign Politics*, page 161, London, 1905. — In respect of the injury done by civil wars — revolutions — nothing better can be found than the exposition of Prof. F. Martens, in his pamphlet entitled "*Par la Justice vers la Paix*," St. Petersburg, 1904, which he dedicated to the Argentine note, and for whose generous appreciation the author of these lines cannot show sufficient gratitude. — See page 13 *op. citada*.

contract subject in so far to the rules and provisions of private law. Its jurisdictional faculties, as a political entity, are not affected, nor are they in the least impaired; it acts as a civil person, and nothing further is involved than the revenues of the exchequer.

If the contracting government fails in its promises, the individual has a clear and defined judicial action before the courts or the administrative commissions of accounts or others, which is equivalent to a tribunal, designated for these cases in the country of the contract.

Difficulty might arise if the government were to claim exemption and invoke its character of sovereign as an excuse for not answering before the tribunals for its obligations of private law, but that difficulty may, in reality, be considered as purely academic. The legislation of the great majority, if not of all the civilized countries, provides for these cases special tribunals or courts of claims with competent jurisdiction.

Some times a legal fiction serves to spare the susceptibility of the sovereign. Thus in England there would strictly be no way of repairing wrongs that emanate from the Crown, since it is a fundamental principle of English institutions that the King can do no wrong and commit no unlawful act. Private rights are, however, perfectly guaranteed by an ingenious procedure which saves absolutely the Royal prerogative. The law permits the individual to present to the King a petition called "Petition of Right," which in reality is equivalent to a demand, and as it is presumed "that the King can know of no wrong without immediately repairing it," he hastens to submit the case to justice.⁵

In the Argentine Republic, and in the majority of the South

⁵ "That the sovereign can, in his own person, do no wrong is a fundamental principle of the English Constitution; yet * * * his acts may in themselves be contrary to law and subject on that ground to reversal.

For whenever it happens that by misinformation or inadvertence the sovereign hath been induced to invade the private rights of any subject, and becomes by a proper representation informed of the injury sustained, — the law always then presumes that to know of any injury and to redress it, are inseparable in the Royal breast; and issues as of course, in the Sovereign's own name, an order to his judges to do justice to the party aggrieved." Stephens, *Commentaries on the Laws of England*, 9th edition, vol. 3, page 666. Compare *New Commentaries on the Laws of England*, by the same author, vol. 3, page 621.

American States the federal government may be cited without previous consent, and the same is true of all our provinces in matters of local administration without distinguishing whether the claimants are native or foreign.

In this respect we have gone further than the United States. There the government cannot be brought to court,⁶ but citizens have the right, in matters of contract with the executive, to bring action in the Court of Claims. Foreigners have not this right, unless the governments of their allegiance accord the same privilege to the citizens of the United States.⁷

The Argentine note of December 29, 1902, deliberately excluded this class of relations and claims "for whose adequate appreciation" it said "the laws of the respective countries would have to be consulted," and confined its attention solely to the forcible collection of the interest on bonds of public debt. These bonds constitute, in effect, an exceptional class of obligations, not to be confused with any other. They are issued by virtue of the sovereign power of the state, as is its currency, they are authorized by legislation and do not present any of the general characteristics of the contracts of private law, since there is no person specified in whose favor the obligations are incurred, payment being promised always to the bearer without discrimination.

The creditor in turn advances the money not in the form of an ordinary contract *de mutuo*, but purchasing the bonds in the open market without other formality or relation with the debtor government. When payment on a public debt is suspended there is no such thing as an appeal to the government nor is there judicial action in the courts, because the interruption in the payments occurs in virtue of the sovereign authority of the state, manifested *jure imperii*.

⁶ Amendment 11 to the Constitution in accordance with Hamilton's theory. Hamilton, who wrote in 1788, occupied himself alone with the domestic phase of American judicial administration, and not, as some have erroneously affirmed, with the collection of foreign loans unknown at that time. (Federalist LXXXI.) From the time of the appearance of *The Federalist* until long after Hamilton's death (1804), the attention of the entire world was furthermore absorbed by the French revolution and by the wars of Napoleon I. The forcible collection of the debts of one nation by another could not even have been foreseen at that time.

⁷ Revised Statutes, 1878, section 1068.

And this is what marks the essential difference in the law of nations between the two orders of state obligations, namely, those derived strictly from contracts of private law and those that arise from public loans. In the former the government which acts administratively as a party, *jure gestioni*, is or may be, as we have said, cited to answer for its acts or omissions before a tribunal or court of claims according to the provisions of jurisdiction established by its own institutions. If there is no tribunal which has jurisdiction over this class of litigation, it is conceived that such can be created at any moment, spontaneously or through diplomatic intervention. The entire absence of any tribunal or court of claims at a given moment and the flagrant injustices that may be committed where they existed in violation of the laws, fall under the general category of "Denial of Justice" or "Notorious Injustice," which is its equivalent, and give rise to diplomatic action perfectly well defined by international uses as in the other ordinary cases of violation of the laws of nations. In this respect the Argentine note very clearly states that it does not claim for the South American countries any exceptional situation in their relations to the Powers of Europe

which have the right to protect their subjects as amply as in any and every other part of the globe against the persecutions and injustices of which they may be the victims.⁸

It is only where justice has been denied or unreasonably delayed by the courts of justice of foreign countries, where these are used as instruments to oppress American citizens or deprive them of their just rights, that they are warranted in appealing to their government to interpose.⁹

In the application of these principles the United States has set us a splendid example of equanimity and prudence. The eminent Secretary of State Mr. Seward wrote in 1866 to the American Minister in Colombia:

"In case of failure to execute such contracts or engagements, the competent tribunals are the only ones qualified to arrange the conflicts and to apply the laws. Before the preliminary examination of the reciprocal relations between the contracting party shall have been made by the tribunals, the government of the foreigners interested could never intervene effectively. A serious and effective intervention could only be approved in the case of a denial of justice evident and formally proven." Martens, "*Par la Justice vers la Paix*," Paris. Page 31.

⁸ Secretary of State Mr. Buchanan to Mr. Osma, Peruvian Minister, February 1, 1848. Moore's Digest of International Law, vol. 2, page 87.

We are unfortunately too familiar with complaints of the delay and inefficiency of the courts in the South American Republics. We must, however, continue to repose confidence in their independence and integrity, or we must take the broad ground that those states are like those of Oriental semi-civilized countries, — outside the pale within which the law of nations, as generally accepted by Christendom, is understood to govern. The people who go to these regions and encounter great risks, in the hope of great rewards, must be regarded as taking all the circumstances into consideration, and cannot with reason ask their governments to complain that they stand on a common footing with native subjects in respect to the alleged wants of an able, strong, and conscientious judiciary. We cannot undertake to supervise the arrangements of the whole world for litigation, because American citizens voluntarily expose themselves to be concerned in their deficiencies.¹⁰

Claims arising from foreign loans have necessarily to follow a different course and consequently give rise to reflections of another kind. In respect of these there is not and cannot be any "denial of justice," because not only does there not exist a tribunal competent to bring action against the debtor state, but it is impossible even hypothetically to conceive of such a tribunal.¹¹

The same would be true of an attempt to bring to judgment a nation that had declared the forcible circulation of its paper currency. The sovereignty of the claimant state thus finds itself face to face with the debtor sovereignty without prescribed process and by virtue of facts that by their nature correspond to the exercise of the essential faculties of independence and self-government.

Thus formulated the question has given rise to very diverse opinions. Many hold to the circular of Lord Palmerston of 1848, confirmed in 1880 by Lord Salisbury, according to which the right of military intervention is indisputable, it to be decided in each case

¹⁰ Moore's Digest of International Law, vol. 6, page 660.

¹¹ "There are conflicting views as to whether 'claims' includes bonds, — confers jurisdiction by the use of that term to entertain a claim based upon government bonds. In the Colombian bond case (Convention with Colombia, 1864), it was held by Sir Frederick Bruce, as Umpire, that there was no jurisdiction in the tribunal to entertain the claim * * * it is easy to see that many reasons of policy exist which would deter a government from insisting on a preferential payment of a part only of the public creditors of a foreign state." Brewer and Butler, International Law, reproduced from the Encyc. of Law and Procedure, New York, 1906, page 1736, note 38.

whether it is advisable or not from simple considerations of expediency of purely national and domestic character.¹²

Others like Rivier consider that the fortune of the state is compromised in the investments that its subjects make and that an unavoidable duty of protection, which the author classes with those of self-preservation, obliges it to defend them from the financial mismanagement of foreign governments.¹³

At the time of the publication of the Argentine note the eminent authority on international law, Mr. Carlos Calvo, whose greatly to

¹²The complete text of Lord Palmerston's circular is found in Hall's *International Law*, 5th edition, pages 281 and 282. "A short time previously," says Hall, "Lord Palmerston, in answer to a question in the House of Commons, indicated that under certain circumstances he might be prepared to go to the length of using force." Hall, page 283. Discussing in the House of Commons the right of England to make war on Spain, because of its suspension of payment of the interest on the national foreign debt, which occasioned serious injury to many English subjects, Lord Palmerston affirmed the right of the British government to make war on Spain for this reason, but stated that under the circumstances this policy was not advisable. Lord Palmerston's words are as follows: "But this is a question of expediency, and not a question of power; therefore, let no foreign country who has done wrong to British subjects deceive itself by a false impression either that the British nation or the British Parliament will forever remain patient under the wrong; or that, if called upon to enforce the rights of the people of England, the government of England will not have ample power and means, too, at its command to obtain justice for them." Lord George Bentinck, who replied to Lord Palmerston, observed that after these words nothing more could be desired by the Spanish bondholders. "In the language of my noble friend, coupled with the course he has adopted upon former occasions as regards the payment of British subjects by Portugal and the South American states, the British holders of Spanish bonds have full security that * * * he will exercise the same energy" in their behalf. Moore's *Digest of International Law*, vol. 6, page 286.

¹³"The fortune of the individuals, subjects of the state, forms an element of the wealth and prosperity of that state. The continuance and increase of this fortune is a matter of interest. If, then, it is compromised by the act of a foreign state which administers ill its finances, which betrays the confidence which these individuals have reposed in it when they subscribed to its loan under conditions that were not observed, which violates its engagements towards them, the state to which the injured individuals belong is evidently authorized to take their interests in hand in the manner that it may deem advisable; it will act, either through diplomatic channels or by means of reprisals; all this in the measure that results from the principles of the law of reprisals and from those of intervention." Alphonse Rivier, *Principes du Droit des Gens*, Paris, 1896, vol. 1, page 272.

be lamented death constitutes an irreparable loss for his country, sent a circular to some of his colleagues of the Institute of International Law, soliciting their opinion concerning the doctrines contained in that document. Among the replies received, which were all full of interest and which for the greater part supported our thesis with greater or less restrictions, that of the renowned English jurist consult Professor Westlake was characterized by the vigor with which it attacked it. Professor Westlake presented a very sound argument; which, however, was based upon a verbal error in the translation which he had before him. The Argentine argument for the exclusion of force rested upon the fundamental theory of the sovereignty of the debtor state, against which legal process even in the cases in which it expressly consents to be brought to judgment is not admissible. "The creditor," says the note, "knows that he contracts with a sovereign entity and it is a condition inherent in all sovereignty that legal process cannot be begun or consummated against it."¹⁴

The translator had, in his version, transformed the words *procedimientos ejecutivos* (procedure exécutoire) into *procederes ejecutivos* (procédes exécutoires) and Professor Westlake consequently observes with reason that to accept that principle is equivalent to saying that war, "procède exécutoire" par excellence for the support of national claims, is never just. He adds that sovereignty is not a moral force which, once introduced, lifts mankind to a plain where they have no need of any restraint to check their avarice and violence. Sovereignty is nothing more than an historic fact which indicates the degree of advancement attained by a social organization.

By the words *procedimientos ejecutivos* is meant in the technical legal language of our Spanish speaking country, methods of compulsion for the recovery of a certain class of debts. *Procedimientos* are *ordinary*, in which the rights of the parties are probed to the bottom, or *executive* or summary, by which the collection of the sum claimed is immediately effected, bearing in mind the apparent

¹⁴ Mr. Calvo's Circular and the replies to it are published in a pamphlet entitled "The Monroe Doctrine," Paris, 1903. They may also be found in Drago's "La Republica de Argentina y el caso de Venezuela," page 16 *et seq.*, and in the "Revue General de Droit International et de Legislation Comparée, 1903."

legitimacy *prima facie* of the bond exhibited. A bill of exchange that has matured and been protested gives rise to "executive procedimiento," without prejudice to the eventual restitution to which ultimate proof of the injustice of the recovery might give rise. Indemnification by recovery for damages must always take the full course of ordinary justice in order with full proof to justify the conclusion that the injuries for which indemnity is claimed have really been sustained.

The Argentine note confined itself to the enunciation of the principle that judgments or summary proceedings can in no case be executed against a sovereign because it is a privilege inherent in the nature of his functions that the legitimacy of the claims formulated, when he consents to discuss them before the court, shall be amply investigated with all due process and solemnity. The verbal error, which when once pointed out the entire text of the document contributes to clear up, being thus corrected, the divergency of opinion becomes very trifling.

Sovereignty is a historic fact and may be studied in each of the phases of its long and slow evolution, but it has attributes and prerogatives which may not be disregarded without danger to the stability of social institutions.

The bodies of men that constitute human society are not mere aggregations; they are living organisms with distinct characters and inalienable rights, inherent in their nature, among which is the right to grow and develop independently and without hindrance. Judge Story defined sovereignty as

the supreme, absolute, uncontrollable power, the *jus summi imperii*; the absolute right to govern.¹⁵

In principle the acts of the sovereign may not be discussed, either in his own tribunals or in those of other states without his consent and when that consent is granted, by giving jurisdiction to courts of claims or otherwise, it may not be supposed that by this act methods of compulsion are authorized to substantiate the litigation or to execute the sentence.¹⁶

¹⁵ Brewer and Butler, *International Law*, page 1716.

¹⁶ The Supreme Court of the United States has declared in this connection: "A sovereign cannot be sued in his own courts without his consent. His own

One sovereignty is limited by another but the aggression of the one upon the other is not justified unless it be necessary to secure its own existence. Thus war is many times just, exactly as homicide is just, when it is committed in self-defense, but only in exceptional cases will military measures appear authorized when treating of claims that fall within the province of private law of contract or of recovery of debts. In fact it must not be lost sight of that the subjects of one nation holding bonds of a foreign government, which suspends the payment of interest on its debt, sustain in reality the same loss as he who intrusts his capital to a private enterprise buying, for example, the shares of a corporation that becomes bankrupt. The only difference is that the holder of the bonds has a very great advantage over the shareholder, because the state does not disappear and sooner or later regains its solvency, while the bankrupt company disappears forever without hope of rehabilitation. If, as is evident, the private mercantile misfortunes of subjects in foreign countries do not compromise the existence or the happiness or the ultimate development of the community to which they belong, or impose upon it any duty of protection, how could a war be justified because these subjects, instead of contracting with individuals, contracted with governments, perhaps in the hope of greater profit? The economic consideration relative to the public fortune upon which Rivier bases his argument obtains in the one as in the other case and both ought to be decided in accordance with the same principles, which, however, would give conclusions that were evidently inadmissible.¹⁷

To these considerations there may be added other very fundamental ones. State bonds are without exception payable to the bearer; they are the object of an active commerce in the markets of the dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations by treaty or otherwise voluntarily assumed." *U. S. v. Dickelmann*, 92 U. S. 520.

¹⁷ The same may be said of the theory sustained by another distinguished writer, (Professor Basdevant, in the same *Revue*, cit. note 13), according to which the individual risks of the subscribers to foreign loans ought to be charged to the community to which they belong. This, according to him, would be a social function which would make the burden of the risk lighter, and would increase the probability of its recovery with the aid of military measures. If the functions of a com-

world and they pass from one hand to another, from one moment to another without more formality than the simple transmission. There is therefore no probability that a state which decides to intervene may be assured that it is proceeding in favor of its own subjects and not of foreigners. The reclamation having been made in the name of a definite individual or group of individuals, the news alone of the projected military expedition would cause the quotations on the market to rise, and the case may easily be imagined in which an English or German blockade or naval demonstration is executed after the majority of the bonds in question had already passed to the hands of Belgians or Italians.

It may also happen, and the case is frequent, that the bonds of foreign debt of a country are divided among various nations; that one part is to be found in France, another in England, Holland, or Germany. If all these nations were to intervene separately in defense of their subjects, and if each one of them were to propose, as he would have the right to do, a different mode of recovery or arrangement, it is easy to conceive the hopeless confusion that would result to the prejudice of the interests of all.

Nor should we fail to mention the considerations of the risk which the creditor voluntarily assumes in the hope of gains that increase in proportion to the dangers of loss. In this connection, nothing is more pertinent or to the point than the words of the present head of the British cabinet, Sir Henry Campbell Bannerman, when discussing in the House of Commons the action of the British government in Venezuela:

I venture to say that nothing could be more mischievous than that we should even seem to accept the doctrine, if it deserves to be called a doctrine, that when our countrymen invest in risky enterprises in foreign countries and default follows, it is a duty to rescue them. Every man who invests money in a country like Venezuela knows what he is doing. It would, I suppose, not be quite accurate to say that great risks always

munity for defense and guarantee in favor of each one of its members are carried to this extreme, no difference ought to be made between the subjects that contract with private parties and those that enter into contracts with governments in case of the insolvency of the one or the other of the latter. Divided among all, the expenses and the hazards of recovery would always be much lighter. What the author fails to explain is why those individuals should enjoy alone the profits while the community is to share their risks.

mean high dividends, but it is more nearly accurate if you put it the other way about, — that high dividends generally involve great risks; but if the whole power of the British Empire is to be put behind the investor, his risk vanishes and the dividends ought to be reduced accordingly.¹⁸

The rule of *caveat emptor*, — let the purchaser of bonds beware, — seems to be becoming more and more deeply rooted in the public intelligence. However, nothing has as yet been determined in the matter of the relations between states. The Hague Tribunal to which was submitted for arbitration the question whether the claims of the nations parties to the blockade ought to receive preferential treatment, decided in the affirmative for reasons of various sorts, but did not pronounce upon the question of the legitimacy of the employment of force for the collection of public debts, which was not submitted to it.

According to the decision the government of Venezuela in the protocols of February 13, 1903,

recognized "in principle the justice of the claims" presented by the governments of Germany, Great Britain, and Italy, while in the protocols between Venezuela and the non-blockading Powers the justice of the claims of the latter was not so recognized; that until the end of January, 1903, the Venezuelan government did not protest against the pretention of the blockading Powers to obtain special guarantees for the settlement of their claims and through all the diplomatic negotiations made a formal distinction between "the allied Powers" and "the neutral or pacific Powers;" that the neutral Powers who claimed before the Tribunal equality in the distribution of the customs receipts pledged for the payment of foreign claims did not protest against the pretensions of the blockading Powers to a preferential treatment either at the moment when the war against Venezuela ceased or immediately after the signatures of the protocols of February 13, 1903; that all through the negotiations which resulted in the signatures of the protocols of February 13, 1903, the British and German governments constantly insisted on obtaining guarantees for "a sufficient and punctual discharge" of Venezuela's obligations to them.¹⁹

For all these reasons the blockading Powers were considered to be entitled to preferential treatment.

¹⁸ Hansard's Parliamentary Debates, Session February 17, 1903, 4th series, vol. 118, page 71.

¹⁹ Moore's Digest of International Law, vol. 7, pp 118, 119. See also August Gache's "Le Conflit Venezuelien et l'arbitrage de la Haye," page 200. Paris, 1905.

If the circumstances of fact upon which the decision rests had originated, as everything would lead us to believe, under the pressure of arms it would once more have been demonstrated that the military action of one or various Powers against a debtor state almost always, in one or other manner, prejudices the cause of the other creditors. This the Secretary of State of the United States, Mr. Frelinghuysen, said in his instruction of March 30, 1883, to the American Minister in England, in which he sought a *pro rata* distribution of the disposable revenues of the same Venezuela between various creditor nations in opposition to the pretensions of France, which claimed a preferential twelve per cent. of the same and threatened to adopt war measures against the debtor state if it was not paid. The Secretary of State said:

You will lay the foregoing statement and views before the Minister for Foreign Affairs of Great Britain. You will point out to him that the failure to attain a peaceable settlement as between France and Venezuela, and a resort to force by the former to collect her debt, could not but disastrously affect the ability of Venezuela to meet her just obligations towards the other creditor governments; that the common interest of all is concerned in reaching an amicable solution of the complex problem presented; and that the United States, themselves creditor, will nevertheless subserve their interests in the matter to the common good.²⁰

One of the objections most commonly made to the proposition of the Argentine note is that to accept its conclusions would give ample scope to fraud, Governments acting in bad faith being enabled with impunity to despoil their creditors. But the note very clearly excludes the cases of fraud. "Nor is this," it says, "a defense

²⁰ Mr. Frelinghuysen to Mr. Phelps, Minister to England. Moore's International Law Digest, vol. 6, p. 712. In the last official edition of the Digest, Moore criticises Wharton (compare Wharton's Digest, vol. 2, page 662), saying that he has mistakenly expounded the instruction as follows: "The government of the United States cannot but regard with grave anxiety the attempt of a foreign government to compel by force the payment of mere contract debts due to subjects of such government by a South American state." This is very far from being the signification of Mr. Frelinghuysen's instruction, who, furthermore, did not distinguish between the method of enforcing the payment of debts founded on contract and those arising from tort, nor had he other purpose in view than to avoid the preferential payment claimed by the French creditors to the prejudice of other nations, among which, according to him, the revenues of the debtor Republic ought to be divided *pro rata*.

of bad faith, of disorder and of deliberate and voluntary insolvency." Proven bad faith is in itself an offense which would involve the nation practicing it in grave international responsibilities. Furthermore when it is affirmed that the right to determine the time and opportunity of making the payment ordered by sentence of its tribunals is inherent in sovereignty, it is not meant that such right like the others which are of the essence of sovereignty, including that of accepting summons, may not be voluntarily restricted by treaties, thus placing the matter in its normal relation to the law of nations. Thus arbitration could in cases of doubt establish the financial situation of the debtor and his capacity and the time at which he might find himself in a position to make the payment. The decision which would be rendered in accordance with the protocols entered into would have all the force and all the consequences of obligations arising from the treaties.²¹

In the cases of insolvency that are fairly proven recourse would naturally not be had to force or to coercive military measures. The law of the Twelve Tables that authorized the creditors to quarter the debtor and to divide his members among themselves cannot obtain for nations within the pale of contemporary civilization.

In respect of the deferred interest on public debts properly so-called, and not susceptible of judicial decisions as we have explained, it appears that the good faith of the delinquent government would be established by the mere fact that the native and foreign bondholders receive the same treatment, and would consequently not give rise to further observations. Moderation which is the temper of all law would avoid many injuries and very great injustices; in this temper every nation would receive the credit which it really deserved in the money markets of the world, fraudulent speculation and loans would be made more difficult and, what is more important than all, it would contribute to strengthen the spirit of fraternity, harmony, and good will among the nations of the world.

²¹ In this connection compare the interesting article entitled "The Third Pan American Conference and the Drago Doctrine," that appeared in the review "Die Grenzboten," of Leipzig, for May 24, 1906.

II.

We have said that the Argentine note of December 29, 1902, was a document of distinct purpose and that it, in consequence, had only in view the relation of the European Powers to the States of America. It pointed out a danger that lay very near and it aimed to forestall it. At the time when it was transmitted everything combined to inspire the greatest alarm. There was rife in political and diplomatic circles a constant agitation which was dominated, and was disseminated by the great newspapers of the world, the most important and best accredited reviews and the books of thoughtful men and which pointed out these countries as the best fields for the colonial expansion of the great Powers, once the doors of Africa and the Orient were closed.²²

Mr. Somers Somerset said in substance that in proportion as the available surface of the earth that is suitable for colonization decreases it becomes more and more evident that not only is there no time to be lost in founding an empire, but that the price that a people may be able to allow itself to pay for the acquisition of that territory is steadily rising. The constant pressure of the peoples of Europe, the commercial struggle, and the natural desire for national aggrandizement are bound to be powerful factors; and the consideration of now or never will very soon mark the policy of various European chancelleries. We have already seen that the Old World offers few attractions; there remains only the New World to be considered.²³

²² The note says: "Thinkers of the highest rank have suggested the advisability of turning in this direction the great efforts which the principal Powers of Europe have hitherto made for the conquest of sterile regions, with rigorous climate lying in the most distant corners of the world. There are also many European writers that point out the countries of South America with their great wealth, with their sunny skies and propitious climates as the natural theatre where the great Powers with their arms and instruments prepared for conquest have yet in the course of this century to dispute dominion."

²³ The veto of the Monroe Doctrine, in the opinion of the same author, has, up to to-day, saved American countries from European aggression; but he adds that it must be remembered that during that time the world offered many opportunities for colonization in other regions, and that this period is drawing to its close, and unless the present equilibrium of the war powers is altered in a very marked degree, it is scarcely to be expected that a mere formula or opinion will

For the purposes of this agitation preparatory of future expeditions it was affirmed and it is still to-day affirmed that South America is in the power of degenerate races without capacity for government; that they, in consequence, ought to give way to the more civilized and more advanced nations. This is in fact nothing else than one of the many applications of the Darwinian Theory of the survival of the fittest; the dominion of the superior type which enslaves and excludes organisms that are weaker and more poorly endowed. All contemporary political philosophy is more or less inspired by this harsh theory of struggle and of the predominance of the strong. Doctor Juan A. Garcia has said with singular precision and eloquence:

The events in Venezuela are not isolated facts, measures of policy, or reparation of wrongs, but the opportunity which materialized a tendency latent in Europe since the middle of the past century which in the last years has been emphasized and fortified by the new economic necessities, the idea of races supposedly predestined successors of the Roman Empire that has been made familiar through Germanic philosophy. Long before this tendency appeared there was begun in the German Universities the work of transmutation of moral values, needed to root out the scruples and doubts which made the work difficult and which shattered the efficacy of the iron glove. The morality, right, and justice of the conquerers are harmonized with the philosophy of Darwin, Hagel, Savigny, von Hering, DeSybil and Mommsen.²⁴

But abstract speculations, when they enter into the sphere of facts, obey the same laws as the rays of the sun and passing into the more

continue to protect those countries for long. "Nineteenth Century and After," April, 1903. Previous to this the Duke of Argyll had expressed the opinion in the *Deutsche Revue* that the Argentine Republic is the only country where nothing is despicable but the inhabitants,—a country with a beautiful capital, with a splendid port, with a rich soil, in which everything is excellent except the government; a country which needs only a European protectorate to introduce into it the order desired. See Stead "The Americanization of the World," page 223. And among others the following publications: *Atlantic Monthly*, December, 1901; *Fortnightly Review*, December, 1901; *North American Review*, February, 1903, in which German expansion in Brazil is predicted; *Review of Reviews*, March, 1903; *London Times*, March 12, 1902, and January 26, 1903; *The Pilot*, January 3, 1903; *Morning Post*, January 1, 1903; *North American Review*, April, 1903; *Literary Digest*, February 3, 1903.

²⁴ Juan A. Garcia, Jr., *Bibliographical Notes on La Republica Argentina y el caso de Venezuela*, by Luis M. Drago, in the *Anales de la Facultad de Derecho*. Buenos Aires, 1903.

dense and more complex medium of human conduct suffer the many deviations which refraction imposes upon the original straight line. It is sufficient that a people that possesses the cardinal traits of Christian civilization is weak or momentarily ill-governed for the strong to proceed to annihilate it. Such a people is by the law of nature capable of improvement. It develops along lines of a definite evolution and its interests, narrow and isolated as they may be supposed to be, make themselves known in the general movement and sooner or later contribute to maintain its equilibrium.

The European nations which have reached the summit of civilization in the slow process of elaboration of the centuries have in consequence no right to attack the youthful nations of America, because the latter have not in a short time attained to their degree of development and culture. The adult does not ill-treat the infant because he has not the discretion and the manners of maturity; he protects it rather, extends to it the hand, raises it, nourishes it, and guides it on its way.

Furthermore, these judgments founded on force are extremely dangerous. The superior civilization, the perfected institutions and above all power and efficiency are very variable and entirely relative factors. A nation may be formidable in comparison with another but weak and backward when compared with a third. "On est toujours le Maroc de quelqu'un" said Mr. Izoulet recently and his remark is apt and profound. Theories of violence, of struggle for existence, and of survival of the fittest may thus wound on the rebound the very persons who proclaim them. In the din of the universal conflict in which they desire to involve us, there may arise new social groups superior or stronger and capable of applying the rule of iron to the conquerors of yesterday.

The act of coercion attempted against Venezuela seemed consequently to be the beginning of the hostilities predicted against America. The public debt apparently served as a pretext for that action and forcible recovery could only be effective by the disembarking of troops and the occupation of the ports and customs. The Argentine Republic protested. "The easiest means," it said, "of acquisition and of the supplanting of the local authorities by European governments is precisely that of financial interventions as can be proven with abundant illustrations."

And defining the terms of defense within the limits that corresponded to the occasion and to the exigencies of the moment it proclaimed the principle that

public debt cannot give rise to armed intervention or even to the material occupation of the soil of American nations by a European Power.

Our thesis inspired by the spirit of unity among the nations of that continent thus came to have a scope and aim that were purely American. We enunciated it in connection with the conflict with Venezuela because Venezuela is a sister Republic and because, in the action that unfolded against her, there appeared to be reasons to suspect intentions much more subtle than those arising from a simple collection of debts. We should not have spoken if the country constrained by force to settle its account had been Tunis or Turkey, because that which interests us politically and which is in accordance with our history, with the present exigency of our civilization and of its future possibilities, is the suppression in the existing state of our international relations of the only form in which, or if you prefer, the only pretext upon which the powerful of the earth may trouble the march of the nations of the western hemisphere, in which they are developing and progressing and are to become, with the aid of their liberal institutions, the seat of a great civilization.

When the United States, almost a century ago, proclaimed that they would consider it an unfriendly act on the part of any Power to oppress the nations of this continent or to control in any manner their destinies, they limited their action to that which in reality concerned them. It would have been more generous perhaps and more in conformity with reason and the ideas of humanity to generalize in the proclamation and protest against the oppression of civilized nations in all the extent of the globe. But this would have had results infinitely less adequate. In a speech delivered in Buenos Aires on August 17, 1906, welcoming to that city the eminent Secretary of State of the American Union, Mr. Elihu Root, we took occasion to conform these same ideas in these words:

It was in obedience to a sentiment of common defense that at a solemn moment the Argentine Republic proclaimed the unlawfulness of these forcible collections of public debts by the nations of Europe, — not as an abstract principle of an academic nature, nor as a rule of law for universal

application which we did not possess the power to support, but as an expression of American diplomatic policy which, though well established in law, aimed to avoid for the people of this continent the calamities of conquest in the disguise of financial intervention, in the same way in which the traditional policy of the United States, without pretending to superiority or seeking to subordinate, condemned the oppression of the nations of this part of the world and the control of their destinies by the Powers of Europe.²⁵

From this point of view we add that even in case financial interventions could be justified legally and theoretically (which is far from being true) and constituted a legitimate means for the protection of subjects abroad we should maintain that they cannot be executed in South America. The principle proclaimed presents in this circumscribed form a new phase that is eminently diplomatic and absolutely independent of its legal intent and signification.

Financial interventions are to-day and have always been a political weapon in the hands of the governments. They have all proceeded in accordance with the formula of Lord Palmerston. The right to interfere for the collection of debts is declared indisputable, but the fact itself of the intervention is subordinated to domestic and transitory considerations.²⁶

²⁵ President Roosevelt has done the author the unusual honor to transcribe with commendation these last words in his recent message to the Congress of the Union (December 3, 1906). The speech was edited by Coni, Buenos Aires, also with Secretary Root's reply in "Speeches Incident to the Visit of Secretary Root to South America, Washington, 1906, pages 151-157."

²⁶ Lord Palmerston's Circular is in part as follows: "If the question is to be considered simply in its bearing on international rights, there can be no doubt whatever of the perfect right which the government of every country possesses to take up, as a matter of diplomatic negotiation, any well-founded complaint which any of its subjects may prefer against the government of another country, or any wrong which, from such foreign government, those subjects may have sustained; and if the government of one country is entitled to demand redress for any one individual among its subjects who may have a just or unsatisfied pecuniary claim upon the government of another country, the right so to require redress cannot be diminished merely because the extent of the wrong is increased, and because instead of their being one individual claiming a comparatively small sum, there are a great number of individuals to whom a very large amount is due.

It is, therefore, simply a question of discretion with the British government whether this matter should or should not be taken up by diplomatic negotiation, and the decision of this question turns entirely upon British and domestic consideration."

And these domestic considerations are always and without exception considerations of military expediency. Thus some times there is decreed and at others denied intervention in Turkey, in Tunis, in Morocco on behalf of the same creditors holding the identical bonds, according as the equilibrium of Europe demands or does not demand such action at a given moment. These interventions are always directed against nations that are weak or without allies and in consequence unable to resist them. Never and in no single case has pressure been brought to bear against powerful states.

Russia found herself compelled during a series of years to suspend payment of the interest on her foreign debt and it did not occur to any one that she might be compelled to pay or that her revenues were susceptible of embargo. Portugal openly repudiated a foreign loan without bringing upon herself any international conflict. She did more. She entered into negotiations with her creditors and obtained a temporary reduction of 50 per cent. of the value of her debt, securing the rest of it with various guarantees and a progressive interest. (May 24, 1892.) Not satisfied with this, by simple decree issued on June 15, 1892, the foreign debt was reduced to 33 $\frac{1}{3}$ per cent. without consultation with any of her creditors. This decree was ratified by the law of May 20, 1893, which provided in this respect that the creditor should obtain of the remaining two-thirds only as much as the Portuguese Parliament might ultimately consent to give. Urged in the Chamber of Deputies to take some steps in favor of the French creditors, the Minister of Foreign Affairs, M. Ribot, replied that he would consider what ought to be done, and in the Senate he said

that the government had knowledge of the many numerous interests compromised and that it would do what it could to obtain an equitable treatment from the Portuguese government.

Not only was nothing else done than a friendly interposition of good offices, which had no result, but nothing else was ever thought of. Germany in its turn gave notice to the Portuguese government of

the formal protest of the Imperial government against a decree that violated the right guaranteed by treaty to the German creditors.

The Portuguese Minister of Foreign Affairs simply replied that

he lamented having to proceed as he had done in view of the extreme difficulty of the financial situation.²⁷

These reclamations terminated, as is seen, in a manner very different from that in the case of Venezuela.

Like this, there are many cases which lead us to conclude that financial intervention is exercised only when there are no greater obstacles to overcome in the form of military resistance, and above all when they serve the purpose of a policy of colonization entertained alone or in concert with other powers, in order to gain supremacy or obtain spheres of influence or other advantages pertaining to imperialistic expansion.

And in as much as delay in the payment of the interest on loans has never constituted a *casus belli* between sovereign nations that stand toward one another on a footing of equality, one will readily understand the suspicion which was aroused in the South American countries by the costly naval expeditions and blockades so entirely out of proportion with their immediate object and apparent aim. It is for this reason that we said that, independently of their legal signification, interventions of this kind ought to disappear from South America. They call into question in truth and very pertinently the vital elements of the Monroe Doctrine. The American

²⁷ See Henry Joubert "Les emprunts d'Etats étrangers," Paris, 1905, pages 78, 79. "Up to the present the small states alone have been the objects of reprisals in fact of pacific blockades with or without bombardment of the coasts, as a result of claims that have failed of peaceable adjustment. Never in the case of the great Powers have similar claims given occasion to reprisals in fact.

"This is an indisputable fact which must have its *raison d'être*. It is evident that between the great nations there likewise arise conflicts more or less serious as the result of reclamations or denial of justice, but they are always careful not in times of peace to bombard one another's coasts and establish pacific blockades in order to satisfy their claims. It is very probable that the great Powers have likewise been prejudiced in their rights and interests by the bad will of other states stronger than themselves. But notwithstanding they have abstained from proclaiming pacific blockades of the coasts of the adversary and in times of peace bombarding their open cities and coast towns.

"This positive fact gives occasion for reflection. Is it possible that only the small states are capable of having violated the engagements contracted? Can one pretend that only in the small and feeble states the just claims of foreign subjects are unknown and arouse the sentiment of justice?" Martens "Par la Justice vers la paix," Paris, page 18.

continents are not subject to future European colonization and the independence of the nations of that hemisphere having been recognized, as it has been, it is an unfriendly act on the part of any European Power to pretend to oppress them or in any manner control their destiny. These two postulates constitute the famous formula of emancipation and defense which have taken such deep root in American thought and in American hearts. Their inspiration and origin is to be found in the farewell address with which Washington took leave of his people, and may be followed through the correspondence of Jefferson, Monroe, Rush, and Quincy Adams as well as in the conferences and insinuations of Canning until they culminate in the memorable message of December 2, 1823, and almost simultaneously in the declaration of the British Minister to the French Ambassador M. de Polignac.²⁸

Received with enthusiasm by English public opinion, Lord Brougham declared that the message of President Monroe was an event of such a nature that there has never been another capable of producing greater satisfaction, pride, and gratitude in the free men of Europe, and Sir John MacIntosh added —

This coincidence of the two greater English commonwealths (for so I delight to call them; and I heartily pray that they may be forever united in the cause of justice and liberty) cannot be contemplated without the utmost pleasure by every enlightened citizen of the earth.²⁹

The vigor of the principle proclaimed is evidenced by the mere recollection that after the lapse of eighty years of vicissitudes and diverse fortune, one of the publicists of greatest authority in England, Sir Frederick Pollock, was able in his time to state that

we have not formally repeated the affirmation of the policy of Canning in its modern application, nor have we declared that we accept a joint

²⁸ The Monroe Doctrine has been treated in a masterly manner by Henderson, "American Diplomatic Questions," page 289 *et seq.*; Foster, "A Century of American Diplomacy," page 438; Roosevelt, "The Monroe Doctrine" in "American Ideals," page 228; Sir Frederick Pollock, "The Monroe Doctrine," in "Nineteenth Century and After," October, 1902; John Bassett Moore, "Digest of International Law, vol. 6, page 368 *et seq.* See also the inspired words which Mr. Root uttered in regard to the Monroe Doctrine in his speech before the Chamber of Commerce, in Kansas City, November 20, 1906.

²⁹ Moore's Digest of International Law, vol. 6, page 411.

interest and joint duty in respect of the principles incorporated in the Monroe Doctrine, but we have done more. We have labored in accordance with this policy and with these principles.³⁰

Formulated to check the advance of the Holy Alliance in its intention to subjugate the Spanish colonies which were struggling for their independence in South America, the Monroe Doctrine has gone on developing, adapting itself to the needs of the times and extending its influence until it has been converted into the formula of foreign policy of the new world. We may repeat the eloquent and prophetic expression of Jefferson that it marks the course that we are to follow in the ocean of time that is opening before us.

The Monroe Doctrine is in fact a formula of independence. It imposes no dominion and no superiority. Much less does it establish protectorates or relations of superior to inferior. It creates no obligations and no responsibilities between the nations of America, but simply calls upon all of them, with their own means and without foreign aid, to exclude from within their respective frontiers the jurisdiction of European Powers. Proclaimed by the United States in the interest of its own peace and security, the other Republics of the continent have in their turn proceeded to adopt it with an eye alone to their own individual welfare and internal tranquility.

This moral consort of intentions and tendencies constitutes in itself alone a great force without need of treaties or formal alliances or definite obligations. Thus understood the Monroe Doctrine, which in the end is nothing more than the expression of the will of the people to maintain their liberty, assures the independence of the states of that continent in respect of one another as well as in relation to the Powers of Europe. John Quincy Adams, the principal inspirer if not the author of the message of President Monroe, expressly said:

A necessary consequence of this state of things (independence of the Spanish-American colonies) will be that the American continents henceforth will no longer be subjects of colonization. Occupied by civilized independent nations, they will be accessible to Europeans and to each other on that footing alone.³¹

³⁰ *Nineteenth Century and After*, October, 1903.

³¹ John Quincy Adams to Mr. Rush, July, 1823. *Henderson's American Diplomatic Questions*, New York, 1901, page 332.

Thus there does not exist for the United States in South America a sphere of influence in the sense in which Europe understands the expression. The commerce between our Republics and their powerful sister of the North is almost null as compared with that with the European nations. President Roosevelt said in one of his recent messages:

This doctrine has nothing to do with the commercial relations of any American power save that it in truth allows each of them to form such as it desires.

In a word, it is a guarantee of the commercial independence of the Americas.

Nor is it as some insinuate an antiquated principle that must in consequence fall into disuse. Scarcely eight years ago, so serious a publication as the "Annual Register" reported the existence of a project of European coalition to maintain the dominion of Spain in Cuba.³²

It subsequently transpired that Austria moved by family friendship had sounded France and Germany on the subject of joint intervention. The former, whose citizens were enormously interested in the solvency of Spain, of whose securities they were the chief holders, readily acquiesced. Germany made its acceptance contingent on the co-operation of Great Britain of which neither Power doubted in view of the repeated wranglings between Great Britain and the United States. Mr. Balfour, however, who was in the absence of Lord Salisbury acting as Foreign Secretary, promptly demolished this carefully planned scheme to embroil the two English speaking countries and then to profit by the exhaustion of both. Appreciating fully the real meaning of the "friendly mediation" it was suggested should be offered, he instructed Sir Julian Pauncefote (then Ambassador to the United States) that under no circumstances would Great Britain adopt a policy which might be regarded as unfriendly by the Washington cabinet.

Sir Frederick Pollock accepts this version as practically true and adds that the projected coalition, which would have been an unjustifiable menace to the right and power of the Cubans to chose their own form of government, was not realized. How far the propositions

³² The Annual Register — A review of public events at home and abroad. It was founded at the end of the 18th century by Edmund Burke, the famous orator and statesman, and is to-day one of the most truthful and impartial publications in England. What it contains is almost considered as official.

were formulated and in what measure the terms of England's refusal were categoric and how positive was the intimation that they could not count upon even its neutrality are matters that after all are of no great importance. What since 1898 has remained established as certain is that if any new coalition of this nature is undertaken, the moral as well as the physical force of the British Empire will support the United States.

The theory or what we might call the principle of non-colonization of the doctrine has thus made much progress in recent years, much more than could have been suspected when Bismarck, with more wit than prevision, qualified it as a "simple international impertinence." Keeping in view its own resources and circumstances, the United States limited itself at times to a mere expression of sympathy or moral support to its oppressed sisters, as in 1846, the year of the blockade of the River Plate by the squadrons of France and England.³³

On other occasions the American Union has found itself forced to temporize, as in Mexico during the Napoleonic invasion until the war of secession having been terminated it could demand the immediate withdrawal of the French troops, the beginning of the bloody episode that ended in the tragedy of Queretaro. On other occasions, finally, it imposed arbitration, as in the first Venezuelan controversy, and has contributed, as in the case of Cuba, with its wealth and its

³³ Mr. Buchanan wrote in 1846: "The late annual message of the President to Congress has so clearly presented the great American doctrine in opposition to the interference of European governments in the internal concerns of the nations of this continent that it is deemed unnecessary to add another word upon this subject. That Great Britain and France have flagrantly violated this principle by their armed intervention on the La Plata is manifest to the whole world. Whilst existing circumstances render it impossible for the United States to take part in the present war; yet the President desires that the whole moral influence of this Republic should be cast into the scale of the injured party. We cordially wish the Argentine Republic success in its struggle against foreign interference." Although the United States had in its possession, in 1846, information that would justify it in extending recognition to Paraguay as an independent state, yet the President determined to suspend action on the subject "purely from regard to the Argentine Republic and in consideration of the heroic struggle" which it was "maintaining against the armed intervention of Great Britain and France in the concerns of the Republics on the La Plata and its tributaries." Moore's Digest of International Law, vol. 6, pages 422, 423.

blood to the emancipation of a people. But always and in all cases it has made itself felt in the universal intelligence by this exalted principle of military policy. Some of the great nations have expressly recognized this principle: "Accepting as we do accept frankly and without reserve the Monroe Doctrine to which the United States seems to attribute so much importance," said the Duke of Devonshire not long ago in the House of Lords.³⁴

Lord Cranbourne affirmed in the House of Commons that no nation had endeavored more than England to support the United States in the maintenance of the Monroe Doctrine.³⁵

The Prime Minister, Mr. Balfour, stated in turn in a speech delivered in Liverpool that the Monroe Doctrine has no enemies in England; that England desired neither colonization nor the acquisition of territory in the western hemisphere; and that it had not the least intention of concerning itself with the mode of government of any portion of that continent.³⁶

It is not to be expected that Germany would accept this doctrine with like enthusiasm. However, something very similar to an explicit recognition is found in the *memoria* in which the Imperial Ambassador communicated to the United States the action which his government thought to take in Venezuela.

We consider it of importance to let first of all the government of the United States know about our purposes so that we can prove that we have nothing else in view than to help those of our citizens who have suffered damages. * * * We declare especially that under no circumstances do we consider in our proceedings the acquisition or the permanent occupation of Venezuelan territory.³⁷

Nor is this all. In the First Hague Conference the United States signed the Treaty of Arbitration which is to-day in force, with the express reservation (which the other Powers unanimously accepted) that

³⁴ Hansard's House of Lords, 15th December, 1902.

³⁵ See Hansard's House of Commons, February 17, 1903.

³⁶ Review of Reviews, March, 1903.

³⁷ Pro Memoria of the Imperial German Embassy at Washington of December 11, 1901; Foreign Relations, 1901, page 192. See Moore's Digest of International Law, vol. 6, page 588.

nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not entering upon, interfering with, or entangling itself in the political questions or internal administration of any foreign state, nor shall anything contained in the said convention be so construed as to require the relinquishment by the United States of America of its traditional attitude toward purely American questions.³⁸

The Monroe Doctrine having been accepted in this way by the silent acquiescence of the signatory Powers and having in a certain manner been incorporated into the law of nations, it appears that war measures for the collection of public debts ought to have been excluded from South America. But this is not so. Up to the present moment it is supposed in Europe that blockades and the seizure of the customs are perfectly compatible with the independence and liberty of action of the American governments. Lord Cranbourne said in the House of Commons that the United States themselves recognized that in England's conduct toward Venezuela there was nothing contrary to the Monroe Doctrine, and this affirmation appears to be in accordance with the words of President Roosevelt in his message of 1901 that served as a reply, first, to the German Emperor and later to the Argentine note.

We do not guarantee any state against punishment if it misconduct itself, provided that punishment does not take the form of the acquisition of territory by any non-American power.³⁹

It remains to be proven whether insolvency incurred in good faith as a consequence of the failure of the crops or other phenomena of nature, insolvency of the genuineness of which the creditor is the only judge, may be qualified as misconduct and as deserving punishment. The form of chastisement which the German Emperor proposed was as follows:

After the posing of an ultimatum, first of all the blockade of the more important Venezuelan harbors (that is principally the harbors of La Guerra and Puerto Cabello) would have to be considered as an appropriate measure of coercion, as the levying of duties for imports and exports being nearly the only source of income of Venezuela would in this way be made impossible. Likewise it would be difficult in this way

³⁸ Holls. *The Peace Conference at The Hague*. New York, 1900, page 270.

³⁹ *Foreign Relations*, 1902, page 195; *Moore's Digest*, vol. 6, page 590.

to provide the country, which depends on its imports of corn, with food. If this measure does not seem efficient we would have to consider the temporary occupation on our part of different Venezuelan harbor places and the levying of duties in those places.⁴⁰

These were rigorous measures and well calculated to force the hand of the Venezuelan government and to wrest from it concessions and recognitions that might be justified or not.⁴¹

This is precisely the question made by the Argentine note:

Collection of debts by military force presupposes the occupation of the soil in order to make them effective and the occupation of the soil means the suppression or subordination of the local governments of the countries in which it is effective, which is contrary to the Monroe Doctrine.

President Monroe's Message of 1823 established, as we have said, not only that this country was not in the future open to European colonization, but also that the Powers of Europe could not oppress the new nations or in any manner control their destinies.⁴²

And it must be recognized that there is no form of control more effective and no question more immediate than that which results from an embargo of the revenues or resources of a country. The statement that the material possession of the soil and these embargoes are transitory does not in any manner change this fact. It is sufficient to recall that Great Britain has for twenty-six years administered the government of Egypt temporarily and transitorily and with the sole object of controlling its finances. The forcible collec-

* Moore's Digest, vol. 6, pages 588, 589.

⁴⁰ In this connection we may note the proverbial readiness with which governments exaggerate the amount of their claims. Louis Napoleon suggested the payment of fifteen millions of dollars as the emission of bonds by the banker Jecker, who in reality had only loaned 50,000 pesos to the revolutionary government of Mexico. See Moore's Digest, vol. 6, page 484. In the last Venezuelan conflict Germany claimed 7,500,000 bolivars, of which the Mixed Commission that met in Caracas only allowed her 2,000,000 bolivars. The Italian claim amounted to 39,000,000 bolivars, and was reduced by the Commission to less than 6,000,000 bolivars. Moore's Digest, vol. 6, page 591. Cf. Atlantic Monthly, October, 1906, page 546.

⁴¹ This second declaration, according to Mr. Foster, the distinguished ex-Secretary of State of the United States, incorporates a living principle which should be applied every time that circumstances demand it. Foster, *A Century of American Diplomacy*, page 442.

tion of debts with the accompanying acts of violence would thus in more than one instance expose the Monroe Doctrine to violation.

This abnormal situation it is that the United States has sought to avoid by various offers of arbitration. When in 1861 England, Spain, and France resolved to intervene in Mexico as a consequence of the suspension of the payments on the foreign debt decreed by President Juarez, Secretary Seward, fearing violation of American soil by the parties to the expedition, conceived the idea of the negotiation of a treaty with the debtor republic by which the United States was to assume the debt of that country for a period of five years and thus dissipate every incentive to foreign intervention. The American Senate disapproved this proceeding and the events followed in the manner now well known, — concluding with the evacuation of the territory by France, which from the first moment had been left as the only party in the contest. The Monroe Doctrine was thus compelled to oppose its direct veto to the ambition of Napoleon. In 1904 a new act of coercion on the part of the nations of Europe seemed imminent in the case of the Republic of Santo Domingo, which had fallen into complete bankruptcy. President Roosevelt avoided the repetition of the scenes of Venezuela by concluding the Treaty of February 4, 1905, which in more than one respect is similar to that projected at an earlier date by Mr. Seward. By this arrangement the United States at the same time that they guaranteed the territorial integrity of the Dominican Republic, take charge of the customs, administer the revenues, and divide the proceeds among the creditors to the account of their respective claims, exactly as an administrator or receiver of an insolvent commercial concern would do. We understand this treaty has received the ratification of the American Senate, but before it went into effect the government of the island, by a provisional convention appointed certain persons confidentially proposed by the President of the Union, to receive and administer the customs.

The reasons for this treaty have been expounded in a thorough manner by the American President in his message to the Senate:

When the condition of affairs becomes such as it has become in Santo Domingo either we must submit to the likelihood of the infringement of the Monroe Doctrine or we must ourselves agree to some such arrangement as that herewith submitted to the Senate. * * * Under it the

custom houses will be administered peacefully, honestly and economically, forty-five per cent. of the proceeds being turned over to the Dominican government and the remainder being used by the United States to pay what portion of the debts it is possible to pay on an equitable basis. * * * We on our part are simply performing in peaceful manner not only with the cordial acquiescence but in accordance with the earnest request of the Government concerned, part of that international duty which is necessarily involved in the assertion of the Monroe Doctrine. We are bound to show that we performed this duty in good faith and without any intention of aggrandizing ourselves at the expense of our weaker neighbors or of conducting ourselves otherwise than so as to benefit both these weaker neighbors and those European Powers which may be brought into contact with them. It is in the highest degree necessary that we should prove by our action that the world may trust in our good faith and may understand that this international duty will be performed by us within our own sphere in the interests not merely of ourselves but of all other nations and with strict justice towards all. If this is done, a general acceptance of the Monroe Doctrine will, in the end, surely follow; and this will mean an increase of the sphere in which peaceful measures for the settlement of international difficulties gradually displace those of a warlike character.⁴³

From the spirit of the Dominican Treaty it will thus be seen that the right of European Powers to collect by force in this continent the debts due to their subjects is recognized, but inasmuch as this can only be effected by the occupation of the soil and of the customs, the United States, in order to safeguard the Monroe Doctrine, assumes a sort of supreme magistracy or of superintendence of the South American nations that have fallen behind in the matter of their revenues, making itself the administrator of their finances

⁴³ President Roosevelt's Message to the Senate, February 15, 1905, in Moore's Digest, vol. 6, pages 527, 528. See also his message of December of the same year, in which he says: "We must make it evident that we do not intend to permit the Monroe Doctrine to be used by any nation on this continent as a shield to protect it from the consequences of its own misdeeds against foreign nations." And farther on he observes: "We are liable at any time to be brought face to face with disagreeable alternatives. On the one hand this country would certainly decline to go to war to prevent a foreign government from collecting a just debt; on the other hand it is very inadvisable to permit any foreign Power to take possession, even temporarily, of the custom houses of an American Republic in order to enforce the payment of its obligations. * * * The only escape from these alternatives may at any time be that we must ourselves undertake to bring about some arrangement by which so much as possible of a just obligation shall be paid." The Annual Register, 1905, new series, pages 449, 450.

in order equitably to apportion them among the creditors who certainly, unless their vision is greatly distorted, will recognize their good fortune in finding an agent so powerful to defend their interests. The expedient is beyond a doubt efficient for the purpose of momentarily warding off European intervention, but it has very grave defects. The certainty of immediate recovery without molestation will tend in certain countries to foment questionable loans and far from scrupulous negotiations, so often contracted with revolutionary governments and fortuitous dictators, who do not hesitate to burden the coming generation with measures that compromise economically the future of the country and its ultimate development. This expedient has the further more serious defect that it, in a certain measure, does violence to the sovereignty and in consequence wounds the susceptibilities of the State that has fallen into discredit, even though it may have agreed by treaty to delegate to its powerful protector a part of its governmental functions. This delicate relation would surely contribute to produce estrangement and arouse between the United States and the other nations of America a feeling of envy or jealousy, whereas everything ought to be done to smooth the way to perfect cordiality and good understanding. The *National Review* of London recently said that if the Drago Doctrine were accepted, the Monroe Doctrine would lose its terror for South America; the fearful vision of the United States in the exercise of international police functions thus disappearing. It is the fear that the United States may assume these functions that keeps the two continents separated.⁴⁴

But the ideals of government are, or ought before all to be experimental and consequently advance slowly and laboriously. Communities with their vast, intricate and complex mechanism have to be handled with great tact and infinite precaution, owing to a series of transactions and compromises with necessity and with circumstances that change in aspect from moment to moment. This problem is more arduous in international relations because the prejudices of great groups of men and their natural tendencies have to be conciliated.

⁴⁴ *National Review* "American Affairs," London, November, 1906, page 507.

As in the polygon of forces, the line of motion is always a resultant of divergent tendencies. Fortunate is the case when, as in that in question, a line of constant advance is traced.

Mr. Hay replied to the Argentine note with ceremonious but cordial evasion, neither accepting nor rejecting the doctrines "ably expounded by the Argentine Minister for Foreign Affairs."

Mr. Root was more explicit:

I believe that if the acceptance of the principle that contracts between a nation and an individual are not collectible by force — concerning which subject His Excellency Dr. Drago, the distinguished Argentine Minister for Foreign Affairs, in 1902 addressed an able note to the Argentine Minister in Washington — can be secured at The Hague, a most important step will have been gained in the direction of narrowing the causes of war.⁴⁵

At the banquet celebrated in his honor at the Opera House in Buenos Aires the eminent Secretary of State emphasized this opinion. He said:

We deem the use of force for the collection of ordinary contract debts to be an invitation to abuses in their necessary results far worse, far more baleful to humanity than that the debts contracted by any nation should go unpaid. We consider that the use of the army and navy of a great Power to compel a weaker Power to answer to a contract with a private individual, is both an invitation to speculation upon the necessities of the weak and struggling countries, and an infringement upon the sovereignty of those countries, and we are now, as we always have been, opposed to it; and we believe that, perhaps not to-day nor to-morrow, but through the slow and certain process of the future, the world will come to the same opinion.⁴⁶

Finally, President Roosevelt wrote in his annual Message of December 6, 1906:

In my message to you on the 5th of December, 1905, I called your attention to the embarrassment that might be caused to this Government by the assertion by foreign nations of the right to collect by force of arms contract debts due by American republics to citizens of the collecting nation, and to the danger that the process of compulsory collection might result in the occupation of territory tending to become permanent. I then said:

⁴⁵ Note of March 22, 1906, to the Committee on Programme of the Rio Conference.

⁴⁶ Speeches in South America, page 158.

"Our own Government has always refused to enforce such contractual obligations on behalf of its citizens by an appeal to arms. It is much to be wisht that all foreign governments would take the same view."

All these antecedents worked to bring about the resolution of the Third Pan American Congress held at Rio by which it was recommended to the governments represented to consider the advisability of submitting to The Second Hague Peace Conference the question of the forcible collection of public debts and in general the means that tend to diminish among the nations conflicts of pecuniary origin which, to tell the truth, has in a measure complicated the problem, extending it to all branches of money claims whatever be their origin.⁴⁷

It may be added that this view of the Argentine proposition as one of policy and the manner in which it was advanced as an American doctrine destined to rule in this continent, are what have given it emphasis and a peculiar character and to them is due the name flattering for us with which it is generally known in Europe and in America and of which we make use in referring to it to avoid the inconvenient paraphrases that we have used in certain parts of this article.

"In an article published in the *North American Review* for October 15, 1906, with the title "International Law and the Drago Doctrine," Professor George Winfield Scott writes as follows:

"Dr. Drago merely sought to have the United States adopt, as supplementary to its Monroe Doctrine policy, a further policy to the effect 'that the public debt (of an American State) cannot occasion armed intervention, nor in anywise the actual occupation of the territory of American nations, by an European power.'

"Dr. Drago called attention to the fact that 'the collection of loans by force implies territorial occupation to make it effective; that territorial occupation means the suppression of the governments of the countries on which it is imposed;' that there was considerable European expression in favor of establishing colonies in South America; and that he feared, under the guise of 'financial interventions,' the yearnings evidenced by that expression might be suddenly stimulated and gratified.

"Without commenting on the grounds, or lack of grounds, for such anxiety or on the wisdom of the proposal, attention is called to the difference between the proposition originally urged by Dr. Drago and the question formulated for discussion at Rio de Janeiro. Senor Drago proposed a question of policy for the Pan-American States. The resolution under consideration at Rio de Janeiro involved the submission to the next Hague Conference of a question of law."

Let us review the ideas expounded thus far and the conclusions drawn from them.

We have noted the difference that exists between ordinary contracts in which the State acts as a legal person acquiring rights and accepting definite obligations in respect of certain specified individuals. These contracts go to the tribunals or courts of claims in case of failure on the part of the government to execute them; in case of denial of justice the common and accepted principles of international law, which there is no occasion here to review, obtain for these contracts.

Debts arising from domestic or foreign loans through the emission of bonds of a fixed interest constitute what is technically called public debts properly speaking or national debts. This does not and cannot give rise to judicial action as has been explained, because the bonds that constitute it are put into circulation like paper money and payments are made on the same or are suspended by virtue of acts of sovereignty perfectly characterized as such.

We said that the Argentine note of December 29, 1902, referred to such public debts and to no other. Because it is the collection of such debts *manu militari* which give rise to most grave consequences.

The isolated claims of individuals arising from ordinary contracts can indeed always be disposed of with more or less difficulty, avoiding by means of payment the action which though unjust, a foreign government might take to compel it.

In the case of public debts, properly so called, the same cannot happen because the suspension of the payment always brings with it a profound disturbance of the finances and economic resources of the debtor country. Thus occasion is given for intervention, and at times intervention for indefinite periods, the double control of Egypt, the commissions of Turkey, the subordination in fact of the local government to the creditor nation so frequently repeated in recent history. This is what the Argentine Republic sought to avoid. Its doctrine is in consequence before all and above all a statement of policy. If judicially the public debt cannot be an object of international compulsion, as every consideration leads us to believe, there is no reason why the European nations should attempt recovery in this manner in South America. But if it should

be proven on the contrary that coercion is legitimate and in accordance with law, we shall continue to maintain that violent methods of recovery are not applicable to us, because they either represent from the outset, or may ultimately involve, the subordination and conquest which the traditional policy of both Americas forever exclude.

LUIS M. DRAGO.

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GEORGE G. WILSON, Brown University.

THEODORE S. WOOLSEY, Yale University.

DAVID J. HILL, The Hague, European Editor.

Managing Editor,

JAMES BROWN SCOTT, George Washington University.

EDITORIAL COMMENT

THE NATIONAL ARBITRATION AND PEACE CONGRESS AT NEW YORK

The great meeting of the National Arbitration and Peace Congress held last April in New York, over which Mr. Andrew Carnegie was the presiding genius, was eminently successful in arousing public interest and enlightening public opinion in regard to the questions to be considered, and the position thereon to be taken by the United States, at The Second International Peace Conference, now in session at the Hague.

The opening gun was fired on Sunday, April 14th, when a number of distinguished speakers identified with the religious side of the movement, addressed the congregations of many of the churches, inviting and urging the co-operation of all classes and denominations. During the following three days a series of meetings was held, each covering a special phase of the movement, the programme for the meetings being: International Views of the Peace Movement; Women's Relation to the Peace Movement; Young People's Meeting; Commercial and Industrial Aspects of the Peace Movement; The University Meeting; Wage Earners in Re-

lation to the Peace Movement; Legislative and Judicial Aspects of the Peace Movement. The whole programme closed with a public dinner on Wednesday evening, the 17th.

A direct message of good will was sent by the President and among the speakers during the sessions were: Honorable Elihu Root, whose address is referred to more particularly later; Honorable Richard Bartholdt, who discussed the possibilities of an international legislative congress; Baron d'Estournelles de Constant, who addressed the Young People's meeting and several others and conferred the cross of the Legion of Honor upon Mr. Carnegie; Honorable Charles E. Hughes, the Governor of New York; Honorable John W. Foster; Mr. Andrew Carnegie, Chairman of the Congress, who advocated an international police force; Mr. William T. Stead, Baron Descamps, "Maarten Maartens," Prof. Munsterberg, Honorable Oscar S. Straus, Mr. James W. Van Cleave, Dr. Nicholas Murray Butler, Dr. Chas. W. Eliot, Prof. Felix Adler, Honorable James Bryce, Mr. Samuel Gompers, and Honorable William Jennings Bryan, who was the last speaker at the regular meetings.

The resolutions adopted by the Congress called for a permanent international union and conference; a court open to all nations of the world; a general treaty of arbitration; a commission of inquiry to examine questions which are not considered proper subjects for arbitration; immunity of private property at sea from capture; and the limitation of armaments. In the words of the editor of the *Outlook*,

The resolutions adopted were rational enough to appeal to any critic and they fitly define the atmosphere of the Congress—an enthusiasm for justice.

As the representative of the national government particularly charged with the responsibility of directing the efforts of the United States delegation at the Hague conference, Mr. Root was listened to with peculiar interest and his presentation of the difficulties to be encountered, the progress to be expected, and the real measure of the benefits to be derived from international peace conferences, and incidentally from such meetings as the Peace Congress in New York, entitles his address to a lasting place in the history of the great movement for the evolution of peace. The closing words of his address were as follows:

Many lovers of their kind, certain that the principles which they see so clearly ought to be accepted of all men, are unmindful of the many differences which divide the nations in the competition for trade and wealth, for honor and prestige; unmindful that the selfishness and greed and willingness to do injustice which have marked all human history still exist in the world; unmindful that because of these the instinct of self-protection engenders distrust and suspicion among

the nations; and they will be sadly disappointed because The Hague Conference of 1907 does not realize their dreams and usher in the parliament of man — the federation of the world. But let them take heart. A forward step will be taken; an advance will be made toward the reign of peace and justice and righteousness among men, and that advance will go just so far as the character of the great mass of civilized men permits. There lies the true measure of possibility and the true origin of reforming force. Arbitrations and mediations, treaties and conventions, peace resolutions, declarations of principle, speeches and writings, are as naught unless they truly represent and find a response in the hearts and minds of the multitude of the men who make up the nations of the earth, whose desires and impulses determine the issues of peace and war. The end toward which this assemblage strives — the peace of the world — will be attained just as rapidly as the millions of the earth's peoples learn to love peace and abhor war; to love justice and hate wrongdoing; to be considerate in judgment and kindly in feeling toward aliens as toward their own friends and neighbors; and to desire that their own countries shall regard the rights of others rather than be grasping and over-reaching. The path to universal peace is not through reason or intellectual appreciation, but through the development of peace-loving and peace-keeping character among men; and that this development, slow though it be as measured by our short lives, is proceeding with steady and unremitting advance from generation to generation no student of history can question. The greatest benefit of the Peace Conference of 1907 will be, as was that of the Peace Conference of 1899, in the fact of the Conference itself; in its powerful influence molding the characters of men; in the spectacle of all the great powers of the earth meeting in the name of peace, and exalting as worthy of honor and desire, national self-control, and considerate judgment and willingness to do justice.

THE FIRST ANNUAL MEETING OF THE SOCIETY OF INTERNATIONAL LAW.

On the 19th and 20th of April last the American Society of International Law met at Washington for its first annual meeting, which was attended by an unexpectedly large number of the members and the programme, which was published in the last issue of the *JOURNAL*, was successfully carried out. A number of papers of marked ability and interest were read, and the general discussion of the several subjects presented for consideration, which followed the formal addresses, was of a high order. The addresses and proceedings were reported in full and will be found in the Annual Year Book of the Society, a copy of which when published will be sent to each member.

The sessions closed with a banquet on Saturday evening which was largely attended. The speakers of the evening were Honorable Elihu Root, President of the Society, who presided; Honorable James Bryce, Honorable Richard Olney, and Honorable Horace Porter.

The first annual gathering of the members was notable for the number

of leading professors and practitioners of international law who took part and for the value of the work done, and it had the unusual distinction of having as its presiding officers in succession, the Secretary of State, two former Secretaries of State, and the Secretary of Commerce and Labor. The Society may well be congratulated that in the first year of its organization it has more than justified its existence, and also has established just claims to speak with authority in carrying on the work which it has undertaken.

At its annual business meeting the Society elected two honorary members, both men of distinction and standing in the world of International Law, Professor Thomas Erskine Holland, K. C., D. D., LL. D., and Professor Heinrich Lammasch, the latter on the nomination of the Chief Justice of the United States Supreme Court.

The officers of the Society, elected for the ensuing year, are as follows:

President

HON. ELIHU ROOT.

Vice-Presidents

CHIEF JUSTICE FULLER,	JUSTICE DAVID J. BREWER,
JUSTICE WILLIAM R. DAY,	HON. WILLIAM H. TAFT,
HON. ANDREW CARNEGIE,	HON. JOSEPH H. CHOATE,
HON. JOHN W. FOSTER,	HON. GEORGE GRAY,
HON. JOHN W. GRIGGS,	HON. W. W. MORROW,
HON. RICHARD OLNEY,	HON. OSCAR S. STRAUS,
HON. HORACE PORTER.	

CHANDLER P. ANDERSON, *Treasurer*.

JAMES BROWN SCOTT, *Recording Secretary*.

CHARLES HENRY BUTLER, *Corresponding Secretary*.

THE GROWTH OF INTERNATIONAL LAW UNDER A PERMANENT COURT OF
ARBITRATION.

As stated in the opinion of the United States Supreme Court delivered by Mr. Justice Brewer in the recent case of *Kansas v. Colorado*, in referring to the jurisdiction of that Court, "International law is no alien to this tribunal"; and the questions decided in that case are of peculiar interest in their relation to the developments of international law under a permanent Court of Arbitration. It will appear from an examination of the opinion in the case, which is quoted at some length among the judicial decisions in this issue, that although the Court took

jurisdiction of the controversy between Kansas and Colorado by virtue of the judicial power conferred upon it under the Constitution, yet in effect it sat as a tribunal of arbitration between two independent sovereignties, and in the decision of the case applied not the statute law of the Federal Government, for it was distinctly held that the matter was beyond congressional jurisdiction, nor the local law of either State, but, in the language of the opinion, "what may not improperly be called interstate common law", which, if established by an international tribunal, would be called the common law of nations.

The question at issue, as stated in the opinion, was whether Kansas has a right to the continuous flow of the waters of the Arkansas River, as they existed before any human interference therewith, or Colorado the right to appropriate the waters of that stream so as to prevent that continuous flow, or that the amount of the flow is subject to the superior authority and supervisory control of the United States?

On the question of national control it appeared that the navigability of the Arkansas River was not affected, and it was held that the reclamation by irrigation of the arid lands of the States was not one of the enumerated or implied powers of Congress. The argument urged in support of such a power by the Federal Government, which intervened in the case, that there are

legislative powers affecting the nation as a whole which belonged to, although not expressed in the grant of powers,

was disposed of as in direct conflict with the doctrine that this is a government of enumerated powers.

Notwithstanding this lack of federal jurisdiction over the question so far as Congress is concerned, the Supreme Court held that its own jurisdiction extended under the Constitution to the matter in controversy. The opinion points out the significant difference in the grant of powers to the legislative and to the judicial branches of the government, showing that, on the one hand, there is no general grant of legislative power, all legislative powers which are granted being defined, and, on the other hand, that there is no limitation or enumeration of the judicial powers granted and that such grant comprises the entire judicial power of the nation. On this point it is said in the opinion —

when the judicial power of the United States was vested in the Supreme and other Courts, all judicial power which the nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution, it must be held to embrace all controversies of a justiciable nature arising within territorial limits of the nation, no matter who may be the parties thereto.

The opinion then proceeds to point out that although each State has full jurisdiction over waters and the beds of streams within its own borders and

may determine for itself whether the common-law rule in respect to riparian rights or that doctrine that obtains in the arid regions of the West of the appropriation of the waters for the purposes of irrigation shall control,

yet neither State can impose its own policy on the other, and Congress cannot enforce either rule on any State. But, as stated in the opinion, it does not follow, however, that because Congress cannot determine the rule which shall control between the two States, or because neither State can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature or that there is no power that can take cognizance of the controversy and determine the relative rights of the two States.

Jurisdiction over the parties and the subject-matter having thus been established, the question of what system or principles of law must be applied in deciding the mutual rights of the parties still remained to be determined. The situation presented is a close parallel, if not identical, with the submission of a controversy by two independent nations to an international arbitration tribunal for settlement. Legislative control being eliminated, the Court was obliged to turn elsewhere for the law to be applied, and after an examination of its international and common-law authority and jurisdiction, the opinion asserts the right of the Court to itself determine what law shall be applied and to establish the principles of law governing interstate controversies. Its power to sit as an international tribunal, if necessary, and to ascertain and determine the principles of international law is shown; and it is further shown that a common law between States may be developed, with respect to which, as between individuals, there must be a first statement of each principle. In the language of the Court,

as it does not rest on any statute or other written declaration of a sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of the Courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely add certainty.

The fact that this power to determine the justice of interstate disputes had been exercised by the Court in a variety of instances is adverted to, and it is shown that whenever the action of one State

reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States

become a matter of justiciable dispute between them, and this Court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

The Court then uses the significant language referred to above:

In other words, through successive disputes and decisions, this Court is practically building up what may not improperly be called interstate common law.

In arriving at the principles to be applied in the settlement of this controversy the Court holds that it

is not limited to the simple matter of whether any portion of the waters of the Arkansas is withheld by Colorado,

but must consider the effect of what has been done in each State, and that the dispute must be so adjusted as to secure so far as possible to Colorado the benefits of irrigation without depriving Kansas of the right of the like beneficial effects of a flowing stream. It is recognized nevertheless, that the Court has not authority to make a contract between two States, and that

Colorado could not be upheld in appropriating the entire flow of the Arkansas River, on the ground that it is willing to give and does give to Kansas something else which may be considered of equal value.

The cardinal rule of equality of right between States is adopted and at the same time it is held that each State in its relations to others is to some extent bound by the principles to which it is committed under its own laws. Thus, as Kansas is shown under the decisions of its Courts to recognize the right of appropriating the waters of a stream for the purpose of irrigation, subject to the condition of an equitable division between the riparian proprietors, the Court is of the opinion that

she cannot complain if the same rule is administered between herself and a sister State. And this is especially true when the waters are, except for domestic purposes, practically useful only for the purposes of irrigation.

The underlying principle adopted by the Court as controlling in this case is the right of equitable division of the waters between the States and in applying this principle, the Court sifts out from a mass of evidence, the ascertained and anticipated benefits and detriments throughout the whole course of the Arkansas River resulting from the use of its waters, and finds that in Colorado great benefits are derived from the present uses for the irrigation of arid lands and that in Kansas the diminution of the flow of water on account of the uses for irrigation in Colorado

has worked some detriment. In the opinion of the Court, however, the withdrawal of water in Colorado is not excessive, and the detriment resulting in Kansas is not sufficiently extensive to overbalance the widespread benefits in Colorado. The Court holds, therefore,

that equality of right and equity between the two States forbids any interference with the present withdrawal of the water in Colorado for the purpose of irrigation.

Recognizing, however, that the equities might change with changed conditions and that some readjustment may be necessary in the future, the Court says in conclusion:

At the same time it is obvious that if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable division of benefits and may rightfully call for relief against the action of Colorado, its corporations and citizens in appropriating the waters of the Arkansas for irrigation purposes.

The bill is dismissed, therefore, but

without prejudice to the right of the plaintiff to institute new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river.

Not the least of the advantages of a permanent court of arbitration is its ability, as here illustrated, to leave open any questions depending upon future developments and to readjust from time to time, as circumstances may require, the rights of the parties.

THE ASSASSINATION OF GENERAL BARILLAS.

On the seventh of last April, in the City of Mexico, General Barillas, a distinguished citizen of Guatemala, formerly President of that State, was assassinated by one of his own countrymen. The wanton taking of human life is always a distressing thing, and the stealth and cowardice which in this case attended the act, heightened the sense of outrage against those who were parties to the crime. When, therefore, it was found that the murder of General Barillas was for political reasons and possibly at the instigation of high officials of his own government, the Mexican Government was greatly aroused, and consequences more serious than the mere punishment of the assassins for a time were threatened.

An investigation of the tragedy by the Mexican authorities led to the arrest of two young Guatemalan desperadoes who had come to the City of Mexico some time previously with the intent to murder Gen. Barillas. It seems to have been understood between them that the one who had the first opportunity should kill him and both have, therefore, been regarded as equally guilty, although the actual killing was done by only one of them. Upon their examination after the murder, the suspicion was developed that they were the paid instruments of certain persons high in authority in the Republic of Guatemala and that the object was to rid one of the factions in that State of a political enemy.

It was represented by the prisoners that their political friends would shield them from the consequences of their crime, in addition to compensating them for it. Two persons were prominently mentioned by them as the principal instigators of the deed, one of whom stood high in Guatemalan official life, and the other held an important local office under the Government. It was determined by Mexico to request the extradition of these two officials; the former upon the charge of complicity in the murder and the latter as a witness for the purpose of securing his testimony at the former's trial. A demand for extradition was made by Mexico upon Guatemala and refused. Suspension of diplomatic relations between the two countries became imminent and the public press freely predicted war as a result of the failure to comply with Mexico's demands.

It is chiefly due to the pacific and sagacious policy of the great statesman at the head of the Mexican Government that a more serious issue was averted. To what extent the influence of the United States Government was effective toward a peaceful solution of the question may perhaps never be fully ascertained, but that it was used to good effect there seems to be no reason to doubt.

The crux of the diplomatic discussion between the two countries lies in the Mexican demand for the extradition of the alleged instigators of the crime. Article I of the treaty¹ of extradition in force between Mexico and Guatemala provides that:

The Mexican Government and that of Guatemala engage to deliver up to each other, at the request which one of the two Governments may make to the other, with the sole exception of its own subjects, those persons accused or convicted by the competent authorities of the country in which the offence may be committed, as authors or accomplices of the crimes and offences enumerated in Article II of this Convention, who shall be found within the territory of the

¹ Reprinted in the Supplement of this number of the Journal, p. 284.

other Contracting State. Nevertheless, when the crime or offence which may give rise to the requisition for extradition shall have been committed without the territory of the two Contracting Parties, such requisition may be acted upon, provided that the laws of the country applied to authorize the prosecution of such offences committed without its territory.

The Government of Guatemala based its refusal to surrender the official who had been charged with complicity in the murder upon the ground that Article I of the treaty excepted citizens from surrender, and also upon the secondary ground that under the Guatemalan constitution on account of his high official position he was first entitled to a preliminary examination by the National Legislative Assembly of Guatemala, in order to determine whether or not there were grounds for bringing an action against him.

The attitude of the Mexican Government on the other hand, was that the purpose for which the extradition was desired was to afford an opportunity to Guatemala to vindicate herself of the charges made by the two paid assassins against one, at least, of its prominent officers. Mexico had therefore requested the provisional arrest of this official until such time as the proofs in support of the demand for extradition could be presented. It was claimed that Guatemala misinterpreted the spirit of Article I of the extradition treaty, which did not contemplate that neither country should surrender its citizens, but intended that the question of surrender in such cases should be optional, and therefore this opportunity was given to the Government of Guatemala of clearing itself from the suspicion of complicity in the outrage.

The Government of Guatemala having persisted in its refusal to grant the surrender, President Diaz did not press his demand further; but in order that it might be plainly understood that the action of Guatemala was resented, it was determined that the Mexican Minister at Guatemala City, who is accredited to all of the Central American Governments, should change his residence to San Salvador, which was accordingly done. This move did not involve the breaking off of diplomatic relations between Mexico and Guatemala, but indicated the seriousness of the situation. Concerning the case against the principal official involved, the Mexican Government has stated its willingness to rest with the publication of the criminal proceedings against the assassins and some portions of the correspondence, which, it is intimated, will sufficiently show his connection with the crime, without making any comments thereon which might tend to increase the strained relations between the two governments. This publication apparently has not yet been made.

Apart from the heinousness of the principal crime and its possible antecedents, an interesting question of extradition law is presented which appears to have been untouched by the disputants, and that is, whether the idea of extradition does not presuppose an escape from one jurisdiction and a place of refuge in another. The theory of extradition would seem to imply that a person has committed a crime in one country and fled to another to escape punishment, the object of a treaty being to secure the return of such fugitive for trial to the jurisdiction in which the crime was committed. Three elements must be present: a crime committed outside of the country of refuge; a flight; and a surrender for punishment. In this case it cannot be claimed that there was any flight on the part of the alleged instigators of the crime. They have always remained within the jurisdiction of Guatemala.

The principle to which reference has just been made, it is not unreasonable to assume, is one which should prevail in all countries, regardless of whether their legal system is founded upon the Roman law or the common law. As between Mexico and Guatemala, however, specific provision as to this point is made in Article I of the treaty. This article provides in its opening sentence for the surrender of persons accused or convicted of crime in "the country in which the offence may be committed" and it is additionally stipulated in the same article that surrender shall also be made for crimes "which shall have been committed without the territory of the two contracting parties" if the laws of the surrendering government "authorize the prosecution of such offences committed without its territory." It is very clear, then, that Mexico under this treaty may make demand upon Guatemala for all treaty offences committed in Mexico, and also for all such offences committed in third countries, provided that the offender might be punishable therefor in Guatemala under the Guatemalan legal system. But no right is here granted to obtain the surrender of offenders whose crime has been committed, if at all, within the territory of the surrendering government. The obvious implication, therefore, would be that neither of the contracting parties agreed to surrender for crimes committed within its own territory. If this view be correct, the first question to be considered in the present case is whether the offence giving rise to Mexico's demand for extradition can be considered in any aspect to have been perpetrated within the jurisdiction of Mexico; for if it be conceded that the offence was committed within Guatemalan territory then extradition could not be had.

It is not claimed that either of the Guatemalan officials whose extra-

dition was demanded was actually present in Mexico when the alleged instigation to the crime occurred. There remains then only the question of their constructive presence in that country, and a constructive flight to Guatemala. There have been few decisions by the courts of our States which furnish a close parallel, but they maintain the view that, in the absence of a statute changing the common-law principle, where an accomplice in one State incites to the commission of a crime in another, he commits no offence which is punishable under the laws of the latter State. As clear an enunciation of this principle as has been made in our decisions appears in the case of *State v. Wyckoff* (2 Vroom 65), where the Supreme Court of New Jersey held that an accessory before the fact, whose acts of procurement have been done in the jurisdiction of another State, could not be indicted and punished for such procurement in New Jersey, because the offence had not been committed within the jurisdiction of that State. The opinion in this case reviewed all of the authorities upon the question, and the court stated that it was in accord with such authorities as well as with the principles of reason.

There would seem to be a sufficient distinction between this case and such cases as *United States v. Davis* (2 Sumner 482); *Commonwealth v. Blanding* (3 Pick. Mass. 304), and other later cases, which settle the principle that a crime is punishable in the jurisdiction in which it is consummated, or in which it takes effect. Whatever crime was committed by the instigators in this case was committed by them as accessories before the fact. It is familiar common-law doctrine that the crime of the accessory is distinct from that of the principal, so that the locus of its consummation is not identical with that of the principal crime.

Upon the analogy of the New Jersey case, it would follow that extradition does not lie for the act of the accessory committed in the foreign jurisdiction.

The request for the attendance as a witness of the other of the two Guatemalan officials implicated by the Mexican Government was based upon Article XVI of their extradition treaty. There is no obligation under this clause for the compulsory attendance of witnesses, as will be seen from an examination of this article:

When in a non-political criminal case the personal appearance of a witness is needed, the Government of the country where the latter is residing shall request him to appear where he is summoned. If the witness consents to proceed, he shall be at once furnished with the passport that may be necessary, and his traveling and living expenses shall be given to him * * * by the country in which the examination is to take place.

Inasmuch as the above stipulation was conditional upon the consent of the witness, he at first declined to subject himself to the jurisdiction of the Mexican court, offering, instead to give his testimony by deposition and letters rogatory. The refusal of his Government to surrender him had its natural effect in aggravating the situation. This phase of the question was satisfactorily ended, however, by the ultimate consent of the witness and of his Government that he should be placed at the disposition of Mexico, under the specific guaranty of the treaty.

No effort seems to have been made with respect to either of the officials desired by Mexico to invoke the usual provision of extradition treaties exempting from surrender those charged with a political offence. There are obvious reasons why such a reply in this case to the Government of Mexico might have been considered peculiarly unfortunate.

In the early days of June of this year the assassins of General Barillas were tried, convicted of murder and sentenced to death, and this conviction has recently been sustained on appeal. Considerable evidence appears to have been developed tending to implicate persons high in authority in the neighboring State. Concerning the merits of such a charge, absolutely no opinion is expressed. But that such a charge should be thoroughly investigated is hardly open to serious question.

THE ASSOCIATION OF INTERNATIONAL LAW.

On behalf of the American Society of International Law a cordial greeting is extended to The International Law Association of London, the twenty-fourth annual conference of which is to be held this year at Portland, Maine, during the last three days of August, by invitation of the American Bar Association. The programme announced for the meeting is as follows:

Thursday, August 29th.

Inaugural Address by the President of the Conference.

International Arbitration:

1. Paper by Dr. W. Evans Darby, Secretary of the Peace Society, London.
2. Paper by Mr. A. C. Schröder, Zurich.

International Law and International Trade:

Paper by Mr. J. H. Balfour Browne, K. C., London.

Divorce Jurisdiction:

1. Paper by Mr. J. Arthur Barratt, Barrister at Law, London and New York.
2. Paper by Prince de Cassano, Rome.
3. Paper by Mr. W. G. Smith, Attorney at Law, Philadelphia.

Friday, August 30th.

Contraband of War:

1. Paper by the Right Hon. Lord Justice Kennedy, Court of Appeal, London.
2. Paper by the Hon. Charles B. Elliott, Judge of the Supreme Court, Minneapolis, U. S. A.

Neutrality as Discussed at The Hague:

Paper by Sir Thomas Barclay, Paris.

Neutrality Committee:

Communication by Convener, M. Gaston de Leval.

Treaties: As Affecting Subordinate Legislatures:

Paper by the Hon. Everitt P. Wheeler, New York.

Saturday, August 31st.

Limits of Active Intervention by a State to Secure the Fulfilment of Contracts in Favour of its own Citizens entered into by them with other States:

Paper by the Hon. Simeon E. Baldwin, Chief Justice of the Supreme Court of Errors, New Haven, Conn.

Diplomatic Protection of Subjects Abroad:

Paper by M. Gaston de Leval, Advocate, Adviser to the British Embassy, Brussels.

Double Imposts:

Paper by Dr. Ernő Wittmann, Budapest.

Foreign Evidence:

Paper by Dr. A. Hindenburg, Legal Adviser to the Danish Government, Copenhagen.

Company Law:

Formal approval of Code.

Foreign Judgments:

Report of Committee.

This Association was organized at Brussels in 1873 under the name, originally, of The Association for the Reform and Codification of the Law of Nations. It is interesting to note that the moving impulse which led to the formation of the Association emanated from America, and was largely initiated by Honorable David Dudley Field and Elihu Burritt. The title adopted by the Association at that time reflected the belief, then widely entertained, in which Mr. Field's influence may also be recognized, that a Code of International Law must precede any general national resort to arbitration. Subsequent experience has shown, however, that international arbitration is not dependent upon a general codification of international law, and even where the ascertainment of

the law to be applied is a prerequisite to arbitration, special rules, governing the decision of the particular questions submitted, may be adopted by the treaty of arbitration; as for example, in the Geneva Arbitration under the Treaty of Washington between the United States and Great Britain, and in the Venezuela Boundary Arbitration under the Treaty of February 2, 1897, between Venezuela and Great Britain. This seems to have been recognized by the Association early in its existence and apparently no serious attempts have been made by it to codify International Law, and it has turned its attention to more immediately practical questions, although always maintaining the subject of International Arbitration at the head of its programme. The objects of the Association, as stated in its constitution, are those for which it was originally organized, namely: "The Reform and Codification of the Law of Nations," but its name has since been changed to The International Law Association.

In the month preceding the organization of this Association in the year 1873, the Institute of International Law was organized at Ghent by a number of leading international lawyers on the Continent of Europe, with the object of establishing on a scientific basis the foundations of international jurisprudence.

The following statement of the differences in the character of the membership and in the purposes of these two organizations is taken from the Year Book for 1906 of The International Law Association:

The two bodies have proceeded from the first on different lines, as respects both their constitution and their objects. The Institute is a purely scientific body, composed of experts, elected by co-option, whose qualification is that they have already contributed by published writings of acknowledged merit to the development of international law. The Association welcomes to its membership not only lawyers, whether or not specialists in International Law, but ship-owners, underwriters, merchants, and philanthropists, and receives delegates from affiliated bodies, such as Chambers of Commerce and Shipping, and Arbitration or Peace Societies, thus admitting all who, from whatever point of view, are interested in the improvement of international relations. This difference of constitution has naturally led to a corresponding difference in the nature of the work done. The Institute has applied itself to the scientific study of the various branches of International Law, and has adopted series of resolutions or drafted model Codes on a great number of subjects, falling under the heads of Public and Private International Law. These schemes, drafted by a body of experts, representing all the principal nations of the civilized world, have furnished statesmen and practical lawyers with valuable material for settling the difficult questions which arise in modern life between nations, or the citizens of different nations.

It is pointed out, on the other hand, that the Association —

without attempting this purely scientific treatment of questions of international law, has occupied itself in popularising such questions by public discussion, in bringing to bear on their solution the suggestions of practical men — shipowners, merchants, and practising lawyers of different nationalities — and in formulating recommendations likely to have practical effect.

It will be observed that the aims and work of the International Law Association, as above outlined, and of the American Society of International Law are in entire harmony in their respective spheres of action; the object of the latter Society being, as stated in its constitution, to foster the study of International Law and promote the establishment of international relations on the basis of law and justice.

Its constitution also announces its willingness, in furtherance of this object, to co-operate with other societies in this and other countries, having the same object.

Although the English Association and the American Society of International Law are separated in time of organization by nearly a third of a century, they are united in their high purposes and in the pursuit of these purposes, the most cordial and active co-operation cannot fail to exist between them.

The interest of the American people in international law, which in 1873 was reflected in the initiative taken by the distinguished Americans who were instrumental in forming The International Law Association, has kept pace with the growing importance of the international relations of the American nation, and the proceedings of the Association at its coming conference will be followed with particular attention.

THE FUR SEAL QUESTION.

The fur seal question has reached the stage of bulletins from the sick-room. Its fate hangs in the balance, and a brief review of its unfortunate career will therefore be timely, before repentance is too late, and if the worst comes to the worst, it will serve as an obituary notice.

By an Act of Congress, approved December 29, 1897, the United States Government prohibited American citizens and vessels and every one owing allegiance to the American flag from pelagic sealing anywhere in Bering Sea or the Pacific Ocean north of the thirty-fifth parallel of north latitude. Under the Russian laws pelagic sealing has not been permitted since the United States became interested in the sealing

question through the purchase of Alaska. In recent years, therefore, the responsibility for the wasteful destruction of the seal herd, resulting from the killing of the female seals by the pelagic sealers, rests wholly upon the Canadians and Japanese, whose flags have the distinction of being the only ones which stand for the slaughter of the female seals. Whatever the facts may have been in the early history of sealing, conditions have changed, so far at least as pelagic sealing by Americans is concerned, since Kipling wrote of the seal-hunters, —

English they be and Japanee that hang on the Brown Bear's flank,
And some be Scot, but the worst, God wot, and the boldest thieves, be Yank.

The American prohibition of pelagic sealing gave the Canadian sealers the complete monopoly of that business in Bering Sea, for the Japanese sealers had not at that time appeared on the eastern side of the Pacific. The Canadians, however, were subject to the restrictive regulations established by the Fur Seal Arbitration Tribunal in 1893, and by these regulations they were debarred from sealing in the award area, which included the American side of Bering Sea and certain other portions of the North Pacific, in the months of May, June, and July, and they were forbidden at any time to approach within sixty miles of the Pribilof Islands, and were restricted to the use of sailing vessels and prohibited from using firearms for seal hunting in the award area. As Japan was not a party to the arbitration proceeding, the Japanese are not subject to these regulations, and since 1901, when they first began hunting in the award area they have felt themselves free to disregard them. Ever since the Japanese went into the business, the Canadians have found that the restrictions imposed by the regulations have placed them at a decided disadvantage in competing with the Japanese, and the recent seizure of the Canadian sealing schooner "Carlotta G. Cox" by the United States Revenue Cutter "Rush" for violating these regulations, shows that the temptation to carry on their operations on equal terms with the Japanese has proved too strong to be resisted.

But it is no longer true, in Bering Sea at least, that, to quote again from the same authority, "There's never a law of God or man runs north of 'Fifty-Three,'" and the seizure of this vessel gives assurance that, so far as it rests with the United States, such law as there is up there will be duly enforced.

Judging from the attitude of the Canadian sealers, as reported in the public press, this seizure seems likely to have unexpected consequences. Their dissatisfaction with the restrictive regulations of the award on

account of the advantage which results to the Japanese has already been noted, and it now appears that the seizure and probable confiscation of one of their vessels, for hunting where the Japanese sealers may hunt without danger of interference, has been followed by an outburst of indignation from the Canadian sealers, who are reported as demanding that all restrictions against pelagic sealing be abolished and that the Canadians be placed on an absolute equality with the Japanese. From the American point of view, it would seem more appropriate that the desired equality be obtained by securing the adherence of the Japanese to the award regulations, but in the light of the history of this question, it does not seem likely that the United States Government will interest itself in relieving the Canadian sealers from the disadvantages complained of, by either of these methods.

Unfortunately for the Canadian sealers, the responsibility for the difficulty in which they find themselves rests chiefly with the British Government, which presumably has given careful attention to the wishes of the sealers themselves. A brief review of the course of events and the negotiations which have brought about the present situation may not be without interest.

An examination of the records of the Fur Seal Arbitration Tribunal (Protocol LIV) discloses the fact that the preparation of the regulations to be adopted by that tribunal was entrusted to the three neutral arbitrators and, as originally proposed by them, the regulations were intended to apply to all the waters of Bering Sea and the Pacific Ocean, north of the thirty-fifth degree of north latitude, thereby including the Russian and Japanese seal herds as well as the Pribilof herd, for the reason assigned by the arbitrators, that it did not seem equitable to drive the pelagic sealers to Asiatic waters during the closed season in Bering Sea. Objection to such extension was made by the British arbitrators on the ground that inasmuch as the Japanese and Russian sealers were not bound by the regulations they would benefit gratuitously through the imposition on the British of such prohibition against sealing in Asiatic waters. This objection finally prevailed, but the point was yielded by the other arbitrators only in order that subsequent negotiations on the subject by the United States and Great Britain with Japan and Russia, to secure their adherence to the regulations, might not be prejudiced.

After the award was rendered, the United States and Great Britain, in compliance with the provision of Article VII of the Treaty, under which the arbitration was held, extended invitations to Japan and

Russia, among the other powers, requesting their adherence to the award regulations. Each of these governments responded, offering to become a party to the regulations and to enter upon negotiations for that purpose provided that the regulations should be extended so as to apply to Asiatic waters as well as to the waters of the award area. The United States thereupon proposed to Great Britain that the four powers should enter into a treaty to that end. At that time the Japanese pelagic sealers had not as yet invaded the eastern side of Bering Sea, and the Russians, as above stated, were prohibited by their own laws from engaging in pelagic sealing, and, apparently in the expectation that such conditions would continue undisturbed indefinitely, Great Britain informed the United States Government that:

Her Majesty's Government cannot recognize that Russia and Japan have any interest in the seal fisheries on the American side of the North Pacific.

The negotiations were vigorously pressed by the United States, but Great Britain's consent to the proposed extension of the regulations to Asiatic waters has never been given and consequently the adherence of Russia and Japan to the award regulations has never been secured.

It is to be noted that even then the Canadian sealers were actively engaged in pelagic sealing in Asiatic waters. They were not seriously interfered with by Japan, as prior to 1899 Japan was subject to extra-territorial jurisdiction and was consequently unable to enforce its laws and sealing restrictions against British subjects. They were equally free from interference by Russia in their operations outside of a limited prohibitive zone, established by agreement, around the Russian seal islands. Moreover, it was obviously to the advantage of the Canadian sealers to be able to resort to Asiatic waters, and engage in pelagic sealing there, free from any restrictions, during the three months constituting the closed season on the eastern side of Bering Sea under the award regulations. Such being the situation, it seems not unlikely that Great Britain's refusal to extend the regulations to Asiatic waters was not in conflict with the wishes of the Canadian sealing interests. It must be remembered, nevertheless, that the failure to extend the regulations by agreement between the four powers concerned has resulted, not only in bringing about the transfer of the Canadian pelagic sealers to Asiatic waters during the closed season in Bering Sea, which the neutral arbitrators particularly desired to avoid, but it has also resulted in opening Bering Sea to the Japanese sealers, unhampered by the restrictions of the award regulations. Under the circumstances, therefore, the Canadian

sealers cannot present a very strong claim for sympathy in their present difficulties, and, as between them and the Japanese, it is not a matter in which the United States can feel much concern, if the outcome is to give the Japanese what the Canadians may regard as the "lion's share" of the hunting.

There is another side to the question, however, and the United States cannot be expected to look on with indifference at the approaching extermination of the seal herd, through the unscientific and wasteful hunting methods of the pelagic sealers. The position of the United States has been, ever since the question was first subjected to scientific investigation, that the award regulations are wholly inadequate to protect and preserve the seal herd, and that pelagic sealing, if permitted at all, must inevitably result in the extermination of the herd for commercial purposes, and this view has been verified by the results of actual experience. The size of the herd was estimated in 1891 by Canadian and American commissioners to number about 1,000,000 seals. Since then it has steadily decreased, and last year the total number was estimated at about 185,000. For the past three or four years it has shown a regular diminution of not less than 20,000 annually, and there is every indication of a progressive annual diminution in the future, so long as pelagic sealing continues. In justification for attributing this decrease to the destructive methods of the pelagic sealers, it will be sufficient to refer to the conclusions jointly agreed upon by the scientific experts, appointed by the two governments in 1897, who found that the land killing, which is confined to the surplus bachelor seals and is carried on under the supervision of government officials, called for no criticism or objection.

It has further been established beyond controversy that owing to the polygamous habits and reproductive capacity of the seals, if the killing of the female seals was discontinued by the prohibition of pelagic sealing and only the superfluous male seals were killed, as is now the case, under government supervision and regulations on the islands, the herd would, in a comparatively short period, be restored to a numerical strength large enough to guarantee an annual supply sufficient to meet the demands of commerce.

In its efforts to save the seal herd from certain destruction, the United States has repeatedly and urgently sought to supersede the award regulations altogether by an international agreement for the abandonment of pelagic sealing, or, at the very least, to have the award regulations revised, so as to more closely limit the operations of the pelagic sealers, but without success in either direction. Great Britain has invariably refused

to do anything that would change existing conditions. Japan and Russia, on the other hand, have heretofore expressed themselves as willing and ready to enter into a joint agreement for the better protection of the fur seals, and presumably they are still willing to do so. Indeed, such an agreement would now be more than ever to the advantage of Japan in view of the acquisition by Japan of the fur seal herd having its breeding grounds on Robben Island lying adjacent to the coast of Sakhalin Island, ceded by Russia to Japan at the close of the late war. The concurrence of Great Britain, however, is essential to the success of any such arrangement, and if that cannot be obtained the ultimate destruction of the American seal herd for commercial purposes seems to be inevitable. That being the case, there is much to be said in favor of the alternative proposition which has been under consideration in Congress on two or three occasions and was recommended by President Roosevelt in his annual message of December 3, 1906, in these words:

In case we are compelled to abandon the hope of making arrangements with other governments to put an end to the hideous cruelty now incident to pelagic sealing, it will be a question for your serious consideration how far we should continue to protect and maintain the seal herd on land with the result of continuing such a practise, and whether it is not better to end the practise by exterminating the herd ourselves in the most humane way possible.

In addition to the humane considerations thus urged for taking such action, it also may fairly be taken into consideration that if the matter is to be dealt with on a purely commercial basis it would certainly be to the advantage of the United States to secure for itself all the remaining skins by killing the herd while on the islands; thus, at the same time, putting an end to the considerable annual expense involved in maintaining the patrol in Bering Sea and the guard upon the islands for any further period, and avoiding as well any chance of the recurrence of international complications in the future.

The position of the Canadian sealing interests on this proposition is disclosed by a resolution passed by the British Columbia Legislative Assembly when the suggestion was first under consideration in Congress. After reciting that the United States proposed to authorize the killing of all the male and female seals, with an exception of a nucleus for breeding purposes, in case a satisfactory settlement was not arrived at, the resolution continues as follows:

And whereas, the exercise of such a presumed authority is contrary to the finding of the Bering Sea Tribunal, and a direct violation of the spirit of the agreement entered into between the Governments of Great Britain and the United States, and an unwarrantable interference with and infringement upon the undoubted rights of British subject: etc., etc.

It is to be regretted that the Canadian interests have confined their attention so closely to their own side of the case, for it cannot fail to occur to an impartial observer that if the destruction of the seal herd on land by the United States is "a direct violation of the spirit of the agreement entered into between the Governments of Great Britain and the United States," then it is equally a violation of such agreement to destroy the seal herd by pelagic sealing.

THE RECENT AGREEMENTS CONCLUDED BETWEEN JAPAN AND FRANCE.

The text of the agreements concluded between Japan and France on June 10, last, has been received for publication just as the JOURNAL is going to press, and too late for extended comment on this important development of international relations in the far East. The general purport of these agreements was disclosed soon after they were made, but their exact terms have not heretofore been announced, and they are published here as furnishing in themselves a comment more important than an editorial one on a situation which is of particular interest to this country.

When the United States departed from its traditional policy of continental integrity, the question of entangling alliances was at the same time taken down from the shelf, where it had been so securely put away by Washington, and it is now showing unexpected signs of activity in the light of the possible advantages to be derived from similar international agreements applying directly to the interests of the United States in Asia.

The authorized English translation of the agreements referred to is as follows:

ARRANGEMENT CONCLUDED BETWEEN JAPAN AND FRANCE ON JUNE 10TH, 1907.

The Government of His Majesty the Emperor of Japan and the Government of the French Republic, animated by the desire to strengthen the relations of amity existing between them and to remove from those relations all causes of misunderstanding for the future, have decided to conclude the following arrangement:

The Government of Japan and of France being agreed to respect the independence and integrity of China as well as the principle of equal treatment in that country for the commerce and subjects or citizens of all nations and having special interest to have order and pacific state of things preserved, especially in the regions of the Chinese Empire adjacent to the territories where they have rights of sovereignty, protection or occupation, engage to support each other by assuring peace and security in those regions with a view to maintain respective situation and the territorial rights of the High Contracting Parties on the continent of Asia.

In witness whereof, the undersigned M. Sinichiro Kurino, His Imperial Majesty's Ambassador Extraordinary and Plenipotentiary to the Republic of France, and M. Stephen Pichon, Minister for Foreign Affairs and Senator of the Republic of France, duly authorized by their respective Governments have signed the present arrangement and have affixed thereunto their seals.

Done at Paris the 10th of June in the year nineteen hundred and seven.

(Signed) S. KURINO.
" S. PICHON.

DECLARATION SIGNED AT PARIS ON JUNE 10, 1907, BETWEEN JAPAN AND FRANCE.

The two Governments of Japan and France, while reserving the negotiations for the conclusion of a Convention of Commerce in regard to the relations between Japan and French Indo-China, agree as follows:

Treatment of the most favored nation shall be accorded to the officers and subjects of Japan in French Indo-China in all that concern their persons and the protection of their property, and the same treatment shall be applied to subjects and proteges of French Indo-China in the Empire of Japan, until the expiration of the Treaty of Commerce and Navigation signed between Japan and France on August 4th, 1896.

Done at Paris the 10th of June, 1907.

(Signed) S. KURINO.
" S. PICHON.

THE SUPPLEMENT.

Attention is called to the arbitration treaties published in the supplement, which, together with those referred to in Dr. Hill's article in this number on The Second Peace Conference at The Hague, and in connection with a further series to be published in a later issue will show the steady advance among nations in the direction of enlarging the subjects and methods of arbitration. It was intended to present in this number a review of these treaties, but, as some of the most important are among those to be published in a later issue, the discussion of the subject will be deferred until the list is completed.

It was also intended to include in this number an article on the United States Consular Service, and in this connection the official documents appearing in the supplement relating to that subject were printed. Unfortunately, however, the article referred to has been delayed in transmission and will not appear until the next issue.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. Sc. Pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives diplomatiques, Paris; *B.*, boletín, bulletin, bollettino; *B. A. R.*, Monthly bulletin of the International Bureau of American Republics, Washington; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *Mem. dipl.*, Memorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil général de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs-G.*, Reichs-Gesetzblatt, Berlin; *Staatsb.*, *Staatsblad*, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stats. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

September, 1906.

- 24 CHILE—JAPAN. Ratifications exchanged at Washington of treaty of friendship, commerce, and navigation signed at Washington, September 25, 1897, and additional article, explanatory of the most favored nation clause, signed at Tokyo, October 16, 1899. Proclaimed by Chile, March 31, 1907. *Diario oficial*, April 3, 1907.

November, 1906.

- 15 ITALY. Decree instituting a permanent commission for the work relative to commercial treaties and customs tariffs. *B. del Min. Aff. Est.*, March, 1907.

December, 1906.

- 11 FRANCE—ITALY. Ratifications exchanged at Paris of agreement signed at Paris, January 20, 1906. Proclaimed in Italy, December 27. *B. del Min. Aff. Est.*, February, 1907; *Ga. Ufficiale*, February 20, 1907. Transfer of savings bank funds. *See January 20, 1906.*
- 12 BRAZIL—URUGUAY. Protocol signed at Rio de Janeiro, modifying article 4 of agreement of February 14, 1879. *Mensagem . . . pelo presidente*, Rio de Janeiro, 1907. Letters rogatory.

December, 1906.

- 230.s. ROUMANIA—SERVIA. Treaty of commerce signed at Bucharest. Ratifications exchanged at Bucharest, April 2/15. In force April 3/16 for four years. Ratified by Servia, February 120.s. *Monitorul Oficial*, April 3/16.
- 27 BRAZIL. State of São Paulo. Law No. 1045 governing immigration and colonization. *B. A. R.*, May.
- 28 ECUADOR—UNITED STATES. Parcels-post agreement. *Stats. at L.* 34:2974.

January, 1907.

- 5 FRANCE—SERVIA. Commercial treaty signed at Belgrade. Additional to treaty signed June 23/July 5, 1893. Took effect March 11 in Servia. *J. O.*, March 17; *B. mensual de l'office de renseignements agricoles*, April, p. 487.
- 12 BOLIVIA—PARAGUAY. Treaty of arbitration and statu quo signed at Buenos Aires. Brought about by mediation of Argentine Republic in the matter of a boundary dispute. *Mensaje del presidente*. . . Buenos Aires, 1907.
- 14 MONTENEGRO—SERVIA. Commercial treaty signed at Cetinje and at Belgrade. Ratified by Skupshtina, February 19/March 4; ratified by King Peter, February 21/March 6. Published, March 7/20.
- 14 ITALY—SERVIA. Convention signed at Belgrade. Epizooty. Ratifications exchanged at Belgrade March 30. Italian decree promulgating, March 30. *Ga. Ufficiale*, March 30; *B. Min. Aff. Est.*, March.
- 17 ITALY—SWITZERLAND. Decree putting into effect convention signed at Lugano, June 13, 1906; ratifications exchanged at Rome, July 27, 1906. Fishing in waters common to two states. *B. Min. Aff. Est.*, January, 1907; *Ga. Ufficiale*, January 28, 1907.
- 26 GREAT BRITAIN—PANAMA. Ratification by Panama of treaty of extradition signed at Panama, August 25, 1906. *Ga. Oficial*, January 27.
- 31 MEXICO. Ratification by president of postal money order agreement with Italy. Approved by Mexican Senate, October 24, 1906. *Diario oficial (Mexico)*, March 7; *B. A. R.*, April.

February, 1907.

- 1 ITALY—MEXICO. Money order convention took effect. *Ga. Ufficiale*, April 1, 1907; *B. del. Min. Aff. Est.*, April, 1907. Signed at Rome, May 9, 1906; at Mexico, February 13, 1906.

February, 1907.

- 6 BOLIVIA—BRAZIL. Instructions signed at Rio de Janeiro for the mixed boundary commission, in execution of treaty signed at Petropolis, November 17, 1903. *R. dipl.*, June 9; *Mensagem*. . . . pelo presidente, Rio de Janeiro, 1907.
- 8 ARGENTINE REPUBLIC—BRAZIL. Argentine decree approving reports of international mixed commission, constituted conformably with the protocols of August 9, 1895; October 1, 1898, and August 2, 1900. Boundary demarkation. *El B. oficial*, February 13; *B. A. R.*, April.
- 10 ITALY. Ratification of international convention signed at Brussels November 29, 1906. Unification of the formulæ of potent drugs. *B. del. Min. Aff. Est.*, March.
- 23 MOROCCO. Regulations regarding expropriation under the general act of Algeciras adopted ad referendum by commission.
- 15/28 RUSSIA—SERVIA. Treaty of commerce signed at Belgrade. *Times*, March 12.
- 15/28 SERVIA—SWITZERLAND. Treaty of commerce signed at Belgrade.

March, 1907.

- 2 PORTUGAL. Ratifications deposited at The Hague of the three conventions on private international law signed at The Hague, June 12, 1902. These conventions relate to marriage, divorce, and protection of minors. *State Papers*, 95:411, 416, 421. Signatory powers: Germany, Austria and Hungary, Belgium, Spain, France, Italy, Luxemburg, Netherlands, Portugal, Roumania, Sweden, and Switzerland. The ratifications of the following powers were deposited at The Hague, June 1, 1904: Belgium, France, Germany, Luxemburg, Netherlands, Roumania, Sweden. Spain deposited ratification, June 30, 1904, only of the convention concerning minors. Switzerland and Italy deposited ratifications July 17, 1905. *B. del. Min. Aff. Est.*, (Rome) April; *Ga. Ufficiale*, April 6, 1907.
- 3 EGYPT AND SUDAN. Earl Cromer's annual report. Proposes European legislative council. *Lord Cromer's resignation and his last report*, *Spectator*, April 13. *Cd.* 3394, 3451; *Bourne: Lord Cromer's legacy*, *Fortnightly R.* 81:832; *Times*, April 5.
- 6 FRANCE—ROUMANIA. Arrangement signed at Paris. Protection of literary, artistic, and industrial property.
- 6 FRANCE—ROUMANIA. Treaty of commerce and navigation signed

March, 1907.

- at Paris. Approved by Roumanian Senate, March 9/22. To supersede treaty concluded February 16/28, 1893.
- 6 PHILIPPINE ISLANDS. Chinese and immigration circular. Regulations governing immigration of aliens, including Chinese, under Act of Congress approved March 3, 1903, and the Chinese exclusion laws incorporated in the Act of Congress approved April 29, 1902. *Official Ga.*, May 8, 1907.
- 7 GERMANY—NORWAY. Treaty of extradition signed at Berlin, supplemental to treaty signed January 19, 1878. Ratifications exchanged at Berlin May 25, 1907. *Reichs-G.*, 1907. No. 22.
- 7 UNITED STATES. Deposit at Rome of ratification of universal postal treaty signed at Rome, May 26, 1906. *See May 31.*
- 12 GERMANY—GREECE. Treaty of extradition signed at Athens.
- 18 BOLIVIA. Immigration law promulgated. *B. A. R.*, May.
- 21 GERMANY—GREAT BRITAIN. Exchange of notes respecting estates of deceased seamen. *Treaty ser.*, 1907, No. 12.
- 21 BELGIUM—NICARAGUA. Ratifications exchanged at Guatemala of consular convention signed at Guatemala, October 2, 1905. *Monit.*, May 9, 1907; ratified by Belgium, May 25, 1906. *B. Usuel*, May 9, 1907.
26. INTERNATIONAL. Ratifications of convention signed at The Hague, December 21, 1904, deposited at The Hague by Germany, Austria-Hungary, Belgium, China, Denmark, United States, Mexico, Greece, Japan, Korea, Luxemburg, Montenegro, Netherlands, Peru, Portugal, Roumania, Russia, Siam, and Switzerland. Guatemala had adhered March 24, 1906, and Norway January 8, 1907. Exemption of hospital ships in time of war from the payment of all dues and taxes imposed for the benefit of the state. Ratification advised by U. S. Senate, February 21, 1905; ratified by President, October 16, 1906. *B. Usuel; Documents, post. See April 10.*
- 27 BELGIUM—SALVADOR. Ratifications exchanged at Guatemala of provisional commercial convention signed at Guatemala, March 21, 1906. Favored nation treatment in commerce, customs and navigation, excepting concessions by Salvador to other Central American republics. Certificates of origin to be visæd without fee. Took effect April 27, 1907. *B. Usuel.*
- 28 BELGIUM—SWEDEN. Convention signed at Brussels relative to rights of inheriting and acquiring property. Ratifications ex-

March, 1907.

changed, May 3, 1907. *Monit.*, May 10, 1907; *B. Usuel*. Replaces declarations of July 21/August 2, 1838. Take effect June 1, 1907. See *March 31, 1907*.

- 30 ITALY—SERVIA. Ratifications exchanged at Belgrade of treaty of commerce and navigation and final protocol signed at Belgrade, January 14, 1907. *Ga. Ufficiale*, March 30; *B. del. Min. Aff. Est.*, March. See *January 14*.
- 30 GREAT BRITAIN—FRANCE. Additional agreement respecting the parcel-post service between British India and France, signed at Paris. Ratifications exchanged at Paris, May 10, 1907. Treaty ser. 1907, No. 14.
- 31 BELGIUM—SWEDEN. Agreement continuing in force until June 1, 1907, the declarations of July 21/August 2, 1838. *B. Usuel*; *Monit.*, March 31. See *October 20, 1906*.

April, 1907.

- 1 ITALY—ROUMANIA. Ratifications exchanged at Bucharest of treaty of commerce, customs, and navigation signed at Bucharest, December 5, 1906. Takes place of convention of December 23, 1892. *Ga. Ufficiale*, April 10; *B. del. Min. Aff. Est.*, April. A final protocol also was signed and ratifications exchanged on the same dates. *Monitorul Oficial*, April 2. Took effect April 14.
- 1 ITALY—ROUMANIA. Ratifications exchanged at Bucharest of convention signed December 5, 1906, at Bucharest. Literary and industrial property. *Monitorul Oficial*, April 2. Italian decree promulgating, April 4. *Ga. Ufficiale*, April 13; *B. del. Min. Aff. Est.*, April.
- 1 PHILIPPINE ISLANDS. Proclamation of governor-general announcing the calling of a general election to be held July 30, 1907. *Official Ga.*, April 10; *North China Herald*, 83:9. See *January 9* and *March 28*.
- 4 ABYSSINIA—ITALY. Italian law giving effect to treaty of commerce signed at Adis Ababa, July 21, 1906. *Ga. Ufficiale*, April 29; *B. del. Min. Aff. Est.*, April. Ratified by Italy, October 8, 1906. This treaty takes place of that signed June 24, 1897. The first treaty of friendship and commerce between Abyssinia and Italy signed May 2, 1889, was formally abrogated by the treaty of peace signed October 26, 1896. The present treaty is similar to the Abyssinia-Germany treaty signed March 7, 1905. Abyssinia

April, 1907.

has recently signed treaties also with Austria, March 21, 1905; United States, December 27, 1903; Great Britain, May 14, 1897. See December 13, 1906.

- 4 INTERNATIONAL. Ratifications deposited at Brussels of treaty signed at Brussels, November 3, 1906. *Ga. de Madrid*, May 1. Regulating import into certain parts of Africa of spirituous liquors. See November 3, 1906.
- 6 INTERNATIONAL. Ratifications of sanitary convention signed at Paris, December 3, 1903, deposited at Paris by Germany, Austria-Hungary, Belgium, Brazil, Egypt, United States, France, Great Britain, Italy, Luxemburg, Montenegro, Netherlands, Persia, Roumania, Russia, and Switzerland. The convention was also signed by Greece, Servia, Spain, and Portugal.
- 8 FRANCE—GERMANY. Convention signed at Paris to replace convention of April 19, 1883. Protection of literary and artistic property. *Dr. d'auteur*, May; *Mem. dipl.*, May 26.
- 10 FRANCE. Deposit at The Hague of ratification of convention signed December 21, 1904, at The Hague. *J. O.*, April 4 and 5. See March 26.
- 12-22 EXPOSITION INTERNATIONAL D'ALIMENTATION ET D'HYGIÈNE, 24th, at Paris.
- 13 BRAZIL—FRANCE. Brazil denounces treaty of friendship, commerce, and navigation signed January 8, 1826, and additional articles of June 7, 1826, also the arrangement effected by exchange of notes, September 23 and 26, 1889, respecting intervention of French consuls in the disposition of estates of French nationals decedent in Brazil. The commercial clauses of the former treaty had already been replaced by the *modus vivendi* of June 26, 1900, renewed indefinitely, January, 1904. *Q. dipl.*, 23:602.
- 14 NATIONAL ARBITRATION AND PEACE CONGRESS, New York city. Adjourned April 17.
- 15 BRAZIL. Denouncement of conventions with Belgium, Netherlands, Italy, Spain, and Portugal, whereby the consuls of those powers in Brazil were given right under certain conditions to administer the estates of intestates. *B. Usuel. Mensagem...* pelo presidente, Rio de Janeiro, 1907.
- 15 CHINA. Date conventionally fixed for complete withdrawal of Russian and Japanese troops from Manchuria under the treaty of Portsmouth. *The evacuation of Manchuria*, *North China Herald*, April 19.

April, 1907.

- 15 CHINA—JAPAN. Agreement signed at Peking relating to the Hsin-min Fu-Mukden and Kirin-Changchun railways. *Official Ga.*, Tokyo, May 4. The former was built by Japan, and is bought by China; the latter China purposes to construct. In each case China is to borrow part of the capital from a Japanese company, payable in 18 and 25 years respectively.
- 15 THE COLONIAL CONFERENCE, London. Adjourned May 14. *The Colonial Conference, Quarterly R.*, 206:504; *Imperial unity and the colonial conference, id.*, 206:1; *Tupper: The problem of empire, Nineteenth century*, 61:701; Cd. 3404, 3406, 3523, 3524; *National R.*, May, 1907, p. 321; *Colonial preferential tariffs, Edinburgh R.*, 205:380; *Reciprocity and the colonial conference, Spectator*, April 6; *Hain: The Imperial conference, Fortnightly R.*, 81:991; *National R.*, 29:491; *Some issues of the federal conference Spectator*, June 1; *Times*, April 15 *et seq.*; Lord Milner on Imperial Unity, *Times*, June 1.
- 16 CUBA. Decree. Adhesion to (1) the convention with respect to the laws and customs of war on land, (2) the convention for the pacific settlement of international disputes, and (3) the convention for the adaptation to maritime warfare of the principles of the Geneva Convention of 1864; all signed at The Hague, July 29, 1899. *B. oficial dep. estado*, May. For other adhesions see *R. general dr. int. public*, 14:172, and *B. Usuel*, March 14, April 15 and 21, 1907.
- 18 PORTUGAL. Deposit at Paris of ratification of the international convention signed at Paris, March 19, 1902, for the protection of birds useful to agriculture. *J. O.*, April 23, p. 3073. *Monit.*, May 5.
- 19 AMERICAN SOCIETY OF INTERNATIONAL LAW. First annual meeting, at Washington. Adjourned, April 20.
- 23 NICARAGUA—SALVADOR. Treaty of peace signed at Amapala. Nicaragua pledges herself to summon at an early date a conference of the five republics for the purpose of thoroughly readjusting their mutual relations. The program includes a stipulation that in future the republics shall be compelled to submit their differences to arbitration. Pending ratification of a general treaty, the two contracting parties consent to submit any new dispute to the arbitration of the United States and Mexico. Salvador had been drawn into conflict with Nicaragua by her alliance with Honduras.

April, 1907.

- 24 BRAZIL—COLOMBIA. Treaty of delimitation of frontiers and river navigation signed at Bogota. *R. dipl.*, May 12, May 26. From Apaporis and Japura to fort Cucuhy. Mensagem... pelo presidente, Rio de Janeiro, 1907.
- 24 DOMINICAN REPUBLIC. Ratification of international convention for protection of literary and artistic property signed at Mexico, January 27, 1902.
- 25 TURKEY—AUSTRIA—HUNGARY, FRANCE, GERMANY, GREAT BRITAIN, ITALY, RUSSIA. Protocol signed at Constantinople. Imports at present subject to 8 per cent. duty to pay 11 per cent. for seven years; provision for financial requirements of the three Roumelian vilayets; fund assigned by Ottoman government for construction and improvement of customs premises. For the financial règlement of vilayets see *Documents*, 1:209; for the protocol, *Cd.* 3455. See also *Cd.* 3497; *Mem. dipl.*, April 28. See February 27.
- 27 SEVENTH INTERNATIONAL EXPOSITION OF FINE ARTS opened at Venice. *Mem. dipl.*, May 5.
- 29 FRANCE. Two decrees reorganizing the Department of Foreign Affairs. *Mem. dipl.*, April 28, May 5, May 26; *J. O.*, May 3, p. 3265. By an order of December 6, 1906, there was appointed a committee on administrative reform, whose report and report thereon of minister of foreign affairs to President appears in *J. O.*, May 3.

May, 1907.

- 2 GERMANY—UNITED STATES. Commercial agreement signed at Levico; signed at Washington April 22. In force from July 1, 1907, to June 30, 1908, and until six months from notice to terminate. Germany grants conventional rates, United States reduced rates under section 3 of the tariff act, approved July 24, 1897, and certain modifications of the customs and consular regulations. See June 1, 1907, and February 27, 1906.
- 2 JAPAN—RUSSIA. Commercial agreement concluded at St. Petersburg. *Mem. dipl.*, May 5.
- 2 INTERNATIONAL MARITIME EXPOSITION opened at Bordeaux.
- 3 DOMINICAN REPUBLIC—UNITED STATES. Resolution of Congress of Dominican Republic approving treaty signed February 8, 1907. *R. dipl.*, January 20.

May, 1907.

- 4 JAPAN—RUSSIA. Protocol signed at St. Petersburg granting to Japanese subjects rights of fishery along coasts of Russian possessions on Pacific. *Mem. dipl.*, May 12. A temporary measure to enable Japanese to commence fishing in June, when season opens. *Japan Times*, May 12.
- 6 THIRD INTERNATIONAL CONFERENCE FOR TECHNICAL UNITY in railroads opened at Berne. *Mem. dipl.*, May 12. The first conference was held October, 1882; the second, May, 1886. Germany, Austria, Hungary, France, Italy, and Switzerland signed protocol, 1886. Belgium, Bulgaria, Denmark, Luxemburg, Norway, Holland, Roumania, Russia, Servia, and Sweden have adhered to it.
- 7 GREAT BRITAIN. Order in council, under The Foreign Jurisdiction Act, 1890, respecting the coast and islands of the Persian Gulf and Gulf of Oman within the dominions of the Shah of Persia. *London Ga.*, May 10.
- 7 GREAT BRITAIN. Order in council, applying to Peru from May 20th the Extradition Acts, 1870 to 1906, and to the treaty signed at Lima, January 26, 1904, the ratifications of which were exchanged at Lima, November 30, 1906. *London Ga.*, May 10; Treaty ser., 1907, No. 13. See February 11, 1907.
- 8 CANADA—UNITED STATES. Postal convention takes effect. Instead of the former rate of one cent a pound for periodical publications, American newspapers and magazines have to be prepaid at the rate of one cent for each four ounces, and each package must be stamped before it is deposited in the United States post offices. Under the former arrangement neither stamps nor wrappers were required. The bundles made up for each town or city in Canada were weighed at the United States post offices and charged on a pound basis. *American advertising in Canada, Times*, June 3.
- 8 CUBA. Ratification of international sanitary convention signed at Washington, October 14, 1905, by Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, United States, Guatemala, Mexico, Nicaragua, Peru, and Venezuela. See May 29, 1906. *Ga. Oficial*, May 10; *B. oficial dep. estads*, May.
- 16 GREAT BRITAIN—SPAIN. Identical declarations exchanged at London. Preservation of status quo and of rights of the two countries in the Mediterranean and those parts of the Atlantic which wash the shores of Europe and Africa. *Times*, June 17. France and Spain also exchanged similar declarations.

May, 1907.

- 16 NICARAGUA. Congress approves treaty of peace with Salvador. *R. of Reviews*, June.
- 16 SALVADOR. Decree ratifying Pan-American Sanitary convention signed in Washington, October 14, 1905. *See May 8.*
- 17 MEXICO—SALVADOR. Ratification by president of Mexico of parcels-post convention signed at Mexico, October 12, 1906, and at San Salvador, December 4, 1906. Approved by Senate of Mexico, April 29, 1907. *Diario oficial* (Mexico), May 22. Also ratified by Salvador.
- 18 GERMANY—NETHERLANDS. Agreement signed at Berlin concerning regulation of trade in spirituous liquors. *Reichs-G.*, 1907, No. 5.
- 21 EIGHTH INTERNATIONAL AGRICULTURAL CONGRESS opened at Vienna. Adjourned, May 24. *Mem. dipl.*, May 26; *Times*, May 22.
- 21 MEXICO. Señor Gamboa, envoy extraordinary and minister plenipotentiary to the Central American republics, leaves Guatemala for Salvador, the government having decided on the transfer of legation. *Diario oficial* (Mexico), May 23. This action followed refusal by Guatemala of a request by Mexico for extradition of Guatemalan. For treaty, see *documents, post.*
- 22 LAKE MOHONK CONFERENCE ON INTERNATIONAL ARBITRATION. Thirteenth annual session at Lake Mohonk, N. Y. Closed May 24. *Independent*, May 30.
- 22 KONGO. Report of committee of inquiry to King Leopold on Kongo: its political, economic, financial, hygienic and moral condition. *L'étoile belge*, June 8. *See June 3, 1906. Arch. dipl.*, 101:112; Cd. 3450; *The Congo free State and annexation, Spectator*, June 1.
- 27 GERMANY. Deposit at Berne of ratification of Convention signed at Berne, July 6, 1906, for the amelioration of the condition of wounded and sick in armies in the field. *See July 6, 1906 and February 9, 1907.* Davis: *The Geneva convention of 1906*, Am. J. of int. Law, 1:409; *Treaty ser.*, 1907, No. 15; Sperry: *The revision of the Geneva convention, 1906*, Proc. Am. Pol. Sci. Assn., 3:33. The ratifications of Switzerland and Kongo were deposited April 16, 1907.
- 27 FOURTH INTERNATIONAL COTTON CONGRESS opened at Vienna. Adjourned, May 29. Next session at Paris in 1908. *Mem. dipl.*, June 2.

May, 1907.

- 28 INTERNATIONAL ASSOCIATION OF ACADEMIES opened at Vienna. Adjourned, June 2. Next meeting at Rome in 1910. *Times*, May 30/June 4.
- 28 BRUNSWICK. John Albrecht of Mecklenburg-Schwerin unanimously elected regent by the Diet. The new regent was regent of Mecklenburg from 1897 to 1901 during minority of present Grand Duke. *See February 28. Times*, May 29.
- 31 CUBA. Decree ratifying the principal convention, the final protocol, and the regulations for execution of same, concerning the universal postal union signed at Rome, May 26, 1906. *See April 7, 1906. Ga. Oficial*, June 1.
- 31 MEXICO—UNITED STATES. Ratifications exchanged at Washington of convention for the elimination of the bancos in the Rio Grande from the effects of Article II of the treaty of November 12, 1884. Signed at Washington, March 20, 1905; ratification advised by the Senate February 28, 1907; ratified by the President March 13, 1907; ratified by Mexico March 15, 1907; proclaimed June 5, 1907. *Stats. at L.*, vol. 35. For treaty, see *documents, post.*

June, 1907.

- 1 UNITED STATES. Executive order. Amendment of consular regulations of 1896. For text, see *documents, post.*
- 1 UNITED STATES. Treasury Department Circular No. 36. Regulations provided for in the customs commercial agreement with Germany. *See May 2.*
- 1 UNITED STATES. Proclamation extending to Germany certain reduced tariff rates in conformity with the provisions of Section 3 of the tariff act approved July 24, 1897. For text, see *documents, post.*

HENRY G. CROCKER.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

UNITED STATES ¹

Ambassadors and other public ministers of the United States. 1907. 34 p. *House of reps. Committee on foreign affairs.*

Bermuda, parcels-post convention with. 1907. 1 p. *Treasury dept.* (Dept. circular 16.)

Citizens, an act in reference to expatriation of, and their protection abroad. 1907. 2 p. (Public act 193.)

Consular service, appointments and promotions in the, [amendment to order of June 27, 1906]. 1 p. *President.*

Consular service. Executive order [amending paragraph 172 of regulations for consular service concerning registration of American citizens]. 1907. 1 p. *President.*

Consular service, information regarding appointments and promotions in. 1907. 9 p. *Dept. of state.*

Diplomatic service. Executive order [amending instructions to diplomatic officers of the United States and regulations for the consular service]. 1907. 4 p. *President.*

Justice, department of, rules and regulations governing the, and its various branches. 1907. 362 p. *Dept. of justice.* (S. doc. 395.)

International conference of American states, 3d, convention signed August 13, 1906, by delegates of governments represented at, continuing in force, with exception of its third article, convention providing for arbitration of pecuniary claims, signed January 30, 1902. 4 p. *Dept. of state.* (Confidential S. ex. doc. F.)

International conference of American states, 3d, report of delegates to, Rio de Janeiro, Brazil, July 21 to August 26, 1906. 180 p. *Dept. of state.* (S. doc. 365.) Price, cloth, 35c.; paper, 15c.

Japanese and Korean laborers. Executive order [refusing permission to Japanese and Korean laborers who have received passports to Mexico, Canada, or Hawaii to come therefrom to the continental territory of the United States]. 1907. 1 p. *President.*

¹When prices are given, the document in question may be obtained for the amount mentioned from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Japanese and Korean laborers, regulations relating to coming of, to the continental territory of the United States, March 26, 1907. 2 p. *Dept. of commerce and labor.* (Dept. circular 147.)

Prison congress, 7th international, report of proceedings of, Budapest, Hungary, September, 1905. 1907. 173 p. *Dept. of state.* (S. doc. 216.) Price, cloth, 35c.; paper, 15c.

Spanish treaty claims commission. Special report of William E. Fuller, assistant attorney-general. Being a condensed statement of the work done, the questions considered, the principles laid down, and the most important decisions made by the Spanish treaty claims commission from the organization of the commission, April 8, 1901, to April 10, 1907. 352 p. *Dept. of justice.*

Washington, George, calendar of correspondence of, with the Continental Congress. 1907. 741 p., facsim. *Library of congress.* Price, cloth, \$1.50.

GREAT BRITAIN ¹

British colonies, accessions of, etc., to various treaty engagements between the United Kingdom and foreign powers. 1907. *Foreign office.* (cd. 3393.) ½d.

Congo, correspondence respecting the independent state of the. 1907. *Foreign office.* (cd. 3450.) 7d.

Consular fees. China and Corea (consular and marriage fees) order in council, 1906. (Statutory rules and orders, 1906. No. 962.) 1d.

Consular fees. Japan (consular and marriage fees) order in council, 1906. (Statutory rules and orders, 1906. No. 963.) 1d.

Consular fees (general) order in council, 1906. (Statutory rules and orders, 1906. No. 961.) 1d.

Egypt, despatch from the Earl of Cromer respecting the water supply of. 1907. *Foreign office.* (cd. 3397.) 2½d.

Egypt, reports by H. M. agent and consul-general on the finances, administration, and condition of, and the Soudan in 1906. 1907. *Foreign office.* (cd. 3394.) 1s. 4d.

Egyptian general assembly, despatch from the Earl of Cromer respecting proposals of the. 1907. *Foreign office.* (cd. 3451.) 1½d.

France, agreement between the United Kingdom and, relative to the boundary between the Gold Coast and the French Soudan, July 19, 1906. 1907. Maps. *Foreign office.* (cd. 3346.) 2s. 1½d.

¹ Official publications of Great Britain, India and many of the British colonies may be purchased of P. S. King & Son, Orchard House, 2 and 4 Great Smith Street, Westminster, London, England.

Honduras, agreement between the Post office of the United Kingdom and the Post office of the Republic of, for the exchange of money orders. 1907. *Post office*. (cd. 3355.) 2½d.

Honduras, translation of the alien law of the Republic of, February 8, 1906. *Foreign office*. (cd. 3348.) 1d.

Most-favoured-nation clauses, return of, in existing treaties of commerce and navigation between Great Britain and foreign powers, in force on 1st January, 1907. *Foreign office*. (cd. 3395.) 1s. 2d.

National treatment clauses, return of, in existing treaties of commerce and navigation between Great Britain and foreign powers, in force on 1st January, 1907. *Foreign office*. (cd. 3396.) 1s. 2d.

Pharmacopœial formulas for patent drugs, international agreement respecting the unification of the. Signed at Brussels, November 29, 1906. *Foreign office*. (cd. 3392.) 1½d.

Surinam, agreement between the Post office of, and the Post office of the United Kingdom for the exchange of money orders. 1907. *Post office*. (cd. 3354.) 2d.

Swettenham, Sir A., correspondence relating to the resignation by, of his office as Governor of Jamaica. 1907. *Colonial office*. (cd. 3403.) 1d.

Switzerland, agreement between the United Kingdom and, respecting commercial travellers' samples. Signed at Berne, February 20, 1907. *Foreign office*. (cd. 3347.) ½d.

BOLIVIA

Inmigración libre, reglamento de. La Paz, 1907. vii, 14 p. *Ministerio de colonización y agricultura*.

CANADA

Treaties and conventions. Report of the Department of trade and commerce, 1906, pt. 2, p. 237-274. Price, paper, 15c. *Containing*: Convention between Great Britain and Japan, convention between Great Britain and the Republic of Nicaragua, convention between Great Britain and Roumania.

CUBA

Functionarios diplomaticos y consulares, relacion de los empleados del Departamento de estado de los, de la republica y de los agentes diplomaticos y consulares extranjeros acreditados en Cuba. 1907. 37 p. *Dept. de estado*.

Inmigracion, disposiciones relativas a. Habana, 1907. 62 p. *Secretaria de hacienda.*

GERMANY

British Bechuanaland and German S. W. Africa, report on the boundary survey between. Berlin, 1906. 162 p., maps. *Anglo-German boundary commission.*

JAPAN

Corea. [Agreements with Corea, 1904-1905. 1906. 22 p.] *Foreign office.*

Corea. Imperial ordinance No. 267. Organization of the residency-general and residences. [1906.] 6 p. *Foreign office.*

Corea, treaties and conventions between, and other powers. [1905.] 204 p. *Foreign office.*

Russia, correspondence regarding the negotiations between Japan and. (1903-1904.) [1904.] 36 p. *Foreign office.*

Russie, protocoles de la conference de paix entre le Japon et la. [1906.] 89 p. *Foreign office.*

Russia, protocols of the peace conference between Japan and. [1906.] 85 p. *Foreign office.*

Russie, traité de paix entre le Japon et la. [1905.] (French, English, and Japanese texts.) *Foreign office.*

PANAMA

Relaciones exteriores, memoria presentada a la Asamblea nacional de 1906 por el Secretario de gobierno y. Panama, 1907. xcv, 449 p. *Secretaría de gobierno y relaciones exteriores.*

PERU

Consultation pour le Gouvernement du Pérou par M. M. Louis Renault, A. de Lapradelle et N. Politis, professeurs de droit international aux Universités de Paris, de Grenoble et de Poitiers. Paris, 1906. 29 p. *Ministerio de relaciones exteriores.*

Exposición de la República del Perú presentada al Excmo. Gobierno Argentino en el juicio de limites con la República de Bolivia conforme al tratado de arbitraje de 30 de Diciembre de 1902. Barcelona, 1906. vol. 1. *Ministerio de relaciones exteriores.*

Juicio de límites entre el Perú y Bolivia. Conclusiones de la exposición del Perú. Barcelona, 1906. 43 p. *Ministerio de relaciones exteriores.*

Juicio de límites entre el Perú y Bolivia. Prueba Peruana presentada al Gobierno de la República Argentina por Víctor M. Maurtua, abogado y plenipotenciario especial del Perú. Barcelona, 1906. 12 v. Cartas geográficas. 2 v. *Ministerio de relaciones exteriores.*

SWEDEN

Betänkande afgifvet af den enligt nådigt beslut den 17 november 1905 förordnade Kommitté om nya organisationer af Utrikesdepartementet, diplomaten och Konsulatväsendet jämte förslag till utgiftsstater. Stockholm, 1906. iv, 264, 250 p., maps.

URUGUAY

Mensaje del Presidente. 15 de Febrero de 1906. Montevideo. 120 p. Relaciones exteriores, memoria presentada por el Ministro de. 1905. Montevideo, 1906. xxxvi, 63 p. *Ministerio de relaciones exteriores.*

COUR PERMANENTE D'ARBITRAGE

Boutres de Mascate, recueil des actes et protocoles concernant le différend entre la France et la Grande Bretagne à propos des, soumis au Tribunal d'arbitrage constitué en vertu du compromis arbitral conclu à Londres le 13 octobre 1904 entre les puissances susmentionnées. La Haye, juil.-août 1905. La Haye, 1905. 81 p. *Bureau international de la Cour permanente d'arbitrage.*

Exposé de quelques traités d'arbitrage. [1906.] 12 p. *Bureau international de la Cour permanente d'arbitrage.*

Fonds pieux des Californies. Recueil des actes et protocoles concernant le litige du "Fonds pieux des Californies" soumis au tribunal d'arbitrage constitué en vertu du traité conclu à Washington le 22 mai 1902 entre les Etats-Unis d'Amérique et les Etats-Unis Mexicains. La Haye, septembre-octobre, 1902. La Haye, 1902. 110 p. *Bureau international de la Cour permanente d'arbitrage.*

Rapport du Conseil administratif de la Cour permanente d'arbitrage, adressé aux puissances signataires de la Convention pour le règlement pacifique des conflits internationaux, en exécution de l'article 28 de cette Convention, sur les travaux de la Cour, sur le fonctionnement des services administratifs et sur les dépenses pendant l'année, 1901, 9 p.; 1902, 16 p.; 1903, 16 p.; 1904, 32 p.; 1905, 33 p.

Recueil des actes et protocoles concernant le litige entre l'Allemagne, l'Angleterre et l'Italie d'une part et le Venezuela d'autre part. Tribunal

d'arbitrage constitué en vertu des protocoles signés à Washington, le 7 mai 1903 entre les puissances susmentionnées. La Haye, sept. 1903-fév. 1904. La Haye, 1904. 159 p. *Bureau international de la Cour permanente d'arbitrage.*

Recueil des actes et protocoles concernant le litige entre l'Allemagne, la France et la Grande Bretagne d'une part et le Japon d'autre part. Tribunal d'arbitrage constitué en vertu de protocoles signés à Tokyo le 28 août 1902 entre les puissances susmentionnées. La Haye, nov. 1904-mai 1905. La Haye, 1905. 54 p. *Bureau international de la Cour permanente d'arbitrage.*

NOBELSTIFTELSEN

Le développement des conventions de la Haye du 29 juillet 1899. Conference faite à l'Institut Nobel à Kristiania le 18 juillet 1906 par M. Albert Gobat, conseiller national suisse. Stockholm, 1907. 8 p. (Les prix Nobel en 1902, suppl.)

Les prix Nobel en 1904. Stockholm, 1907. 82, 8, 10, 18 p.

PHILIP DE WITT PHAIR.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF
INTERNATIONAL LAW

THE STATE OF KANSAS V. THE STATE OF COLORADO ET AL.

Supreme Court of the United States. May, 1907.

The use of the waters of a non-navigable interstate river for irrigation.

On May 20, 1901, pursuant to a resolution passed by the legislature of Kansas, (Laws Kansas, 1901, chap. 425,) and upon leave obtained, the State of Kansas filed its bill in equity in this court against the State of Colorado. To this bill the defendant demurred. After argument on the demurrer this court held that the case ought not to be disposed of on the mere averments of the bill, and, therefore, overruled the demurrer without prejudice to any question defendant might present. Leave was also given to answer. 185 U. S. 125. * * *

On August 17, 1903, Kansas filed an amended bill, naming as defendants Colorado and quite a number of corporations, who were charged to be engaged in depleting the flow of water in the Arkansas River. Colorado and several of the corporations answered. For reasons which will be apparent from the opinion the defenses of these corporations will not be considered apart from those of Colorado. On March 21, 1904, the United States, upon leave, filed its petition of intervention. The issue between these several parties having been perfected by replications, a commissioner was appointed to take evidence, and after that had been taken and abstracts prepared counsel for the respective parties were heard in argument, and upon the pleadings and testimony the case was submitted.¹ * * *

Mr. Justice BREWER delivered the opinion of the Court.

While we said in overruling the demurrer that "this court, speaking broadly, has jurisdiction," we contemplated further consideration of both the fact and the extent of our jurisdiction, to be fully determined after the facts were presented. We therefore commence with this inquiry. And first of our jurisdiction of the controversy between Kansas and Colorado.

¹ The facts will sufficiently appear in the opinion.

This suit involves no question of boundary or of the limits of territorial jurisdiction. Other and incorporeal rights are claimed by the respective litigants. Controversies between the States are becoming frequent, and in the rapidly changing conditions of life and business are likely to become still more so. Involving as they do the rights of political communities, which in many respects are sovereign and independent, they present not infrequently questions of far-reaching import and of exceeding difficulty.

It is well, therefore, to consider the foundations of our jurisdiction over controversies between States. It is no longer open to question that by the Constitution a nation was brought into being, and that that instrument was not merely operative to establish a closer union or league of States. Whatever powers of government were granted to the nation or reserved to the States (and for the description and limitation of those powers we must always accept the Constitution as alone and absolutely controlling), there was created a nation to be known as the United States of America, and as such then assumed its place among the nations of the world.

The first resolution passed by the convention that framed the Constitution, sitting as a committee of the whole, was "Resolved, That it is the opinion of this committee that a national government ought to be established, consisting of a supreme legislative, judiciary, and executive." 1 Eliot's Debates, p. 151.

In *M'Culloch v. State of Maryland*, 4 Wheat. 316, 405, Chief Justice Marshall said:

The government of the Union, then, (whatever may be the influence of this fact on the case) is, emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

See also *Martin v. Hunter's Lessee*, 1 Wheat. 304, 324, opinion by Mr. Justice Story.

In *Dred Scott v. Sandford*, 19 How. 393, 441, Chief Justice Taney observed:

The new government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one. But, when the present United States came into existence under the new government, it was a new political body, a new nation, then for the first time taking its place in the family of nations.

And in *Miller on the Constitution of the United States*, p. 83, referring to the adoption of the Constitution, that learned jurist said: "It was then that a nation was born."

In the Constitution are provisions in separate articles for the three great departments of government — legislative, executive and judicial. But there is this significant difference in the grants of powers to these departments: The first article, treating of legislative powers, does not make a general grant of legislative power. It reads: "Article I, Section 1. All legislative powers herein granted shall be vested in a Congress," etc.; and then in article 8 mentions and defines the legislative powers that are granted. By reason of the fact that there is no general grant of legislative power it has become an accepted constitutional rule that this is a government of enumerated powers.

In *M'Culloch v. State of Maryland*, *supra*, p. 405, Chief Justice Marshall said:

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.

On the other hand, in article III, which treats of the judicial department — and this is important for our present consideration — we find that section 1 reads that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." By this is granted the entire judicial power of the nation. Section 2, which provides that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States," etc., is not a limitation nor an enumeration. It is a definite declaration, a provision that the judicial power shall extend to — that is, shall include — the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There may be, of course, limitations on that grant of power, but if there are any they must be expressed, for otherwise the general grant would vest in the courts all the judicial power which the new nation was capable of exercising. Construing this article in the early case of *Chisholm v. Georgia*, 2 Dall. 419, the court held that the judicial power of the Supreme Court extended to a suit brought against a State by a citizen of another State. In announcing his opinion in the case, Mr. Justice Wilson said (p. 453):

This question, important in itself, will depend on others more important still; and may, perhaps, be ultimately resolved into one no less radical than this — Do the people of the United States form a nation?

In reference to this question attention may, however, properly be called to *Hans v. Louisiana*, 134 U. S. 1.

The decision in *Chisholm v. Georgia* led to the adoption of the Eleventh Amendment to the Constitution, withdrawing from the judicial power of the United States every suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or citizens or subjects of a foreign State. This amendment refers only to suits and actions by individuals, leaving undisturbed the jurisdiction over suits or actions by one State against another. As said by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 407: "The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States." See also *South Dakota v. North Carolina*, 192 U. S. 286.

Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto. This general truth is not inconsistent with the decisions that no suit or action can be maintained against the nation in any of its courts without its consent, for they only recognize the obvious truth that a nation is not without its consent subject to the controlling action of any of its instrumentalities or agencies. The creature cannot rule the creator. *Kawananakoa v. Polyblank, Trustee, &c.*, 205 U. S. . . Nor is it inconsistent with the ruling in *Wisconsin v. Pelican Insurance Company*, 127 U. S. 265, that an original action cannot be maintained in this court by one State to enforce its penal laws against a citizen of another State. That was no denial of the jurisdiction of the court, but a decision upon the merits of the claim of the State.

These considerations lead to the propositions that when a legislative power is claimed for the national government the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication, whereas in respect to judicial functions the question is whether there be any limitations expressed in the Constitution on the general grant of national power.

We may also notice a matter in respect thereto referred to at length in *Missouri v. Illinois & Chicago District*, 180 U. S. 208, 220. The ninth article of the Articles of Confederation provided that "the United States

in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever." In the early drafts of the Constitution provision was made giving to the Supreme Court "jurisdiction of controversies between two or more States, except such as shall regard territory or jurisdiction," and also that the Senate should have exclusive power to regulate the manner of deciding the disputes and controversies between the States respecting jurisdiction or territory. As finally adopted, the Constitution omits all provisions for the Senate taking cognizance of disputes between the States and leaves out the exception referred to in the jurisdiction granted to the Supreme Court. That carries with it a very direct recognition of the fact that to the Supreme Court is granted jurisdiction of all controversies between the States which are justiciable in their nature. "All the States have transferred the decision of their controversies to this court; each had a right to demand of it the exercise of the power which they had made judicial by the Confederation of 1781 and 1788; that we should do that which neither States nor Congress could do, settle the controversies between them." *Rhode Island v. Massachusetts*, 12 Pet. 657, 743.

Under the same general grant of judicial power jurisdiction over suits brought by the United States has been sustained. *United States v. Texas*, 143 U. S. 621; 162 U. S. 1; *United States v. Michigan*, 190 U. S. 379.

The exemption of the United States to suit in one of its own courts without its consent has been repeatedly recognized. *Kansas v. United States*, 204 U. S. 331, 341, and cases cited.

Turning now to the controversy as here presented, it is whether Kansas has a right to the continuous flow of the waters of the Arkansas River, as that flow existed before any human interference therewith, or Colorado the right to appropriate the waters of that stream so as to prevent that continuous flow, or that the amount of the flow is subject to the superior authority and supervisory control of the United States. While several of the defendant corporations have answered, it is unnecessary to specially consider their defenses, for if the case against Colorado fails it fails also as against them. Colorado denies that it is in any substantial manner diminishing the flow of the Arkansas River into Kansas. If that be true then it is in no way infringing upon the rights of Kansas. If it is diminishing that flow has it an absolute right to determine for itself the extent to which it will diminish it, even to the entire appropriation of the water? And if it has not that absolute right is the amount of appropriation that it is now making such an infringement upon the rights

of Kansas as to call for judicial interference? Is the question one solely between the States or is the matter subject to national legislative regulation, and, if the latter, to what extent has that regulation been carried? Clearly this controversy is one of a justiciable nature. The right to the flow of a stream was one recognized at common law, for a trespass upon which a cause of action existed.

The primary question is, of course, of national control. For, if the nation has a right to regulate the flow of the waters, we must inquire what it has done in the way of regulation. If it has done nothing the further question will then arise, what are the respective rights of the two States in the absence of national regulation? Congress has, by virtue of the grant to it of power to regulate commerce "among the several States," extensive control over the highways, natural or artificial, upon which such commerce may be carried. It may prevent or remove obstructions in the natural waterways and preserve the navigability of those ways. In *United States v. Rio Grande Irrigation Company*, 174 U. S. 690, in which was considered the validity of the appropriation of the water of a stream by virtue of local legislation, so far as such appropriation affected the navigability of the stream, we said (p. 703):

Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far, at least, as may be necessary for the beneficial uses of the Government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take all needed measures to preserve the navigability of the navigable watercourses of the country, even against any State action.

It follows from this that if in the present case the national government was asserting, as against either Kansas or Colorado, that the appropriation for the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream, it would become our duty to determine the truth of the charge. But the Government makes no such contention. On the contrary, it distinctly asserts that the Arkansas River is not now and never was practically navigable beyond Fort Gibson in the Indian Territory, and nowhere claims that any appropriation of the waters by Kansas or Colorado affects its navigability.

It rests its petition of intervention upon its alleged duty of legislating

for the reclamation of arid lands; alleges that in or near the Arkansas River, as it runs through Kansas and Colorado, are large tracts of those lands; that the national government is itself the owner of many thousands of acres; that it has the right to make such legislative provision as in its judgment is needful for the reclamation of all these arid lands and for that purpose to appropriate the accessible waters.

In support of the main proposition it is stated in the brief of its counsel:

That the doctrine of riparian rights is inapplicable to conditions prevailing in the arid region; that such doctrine, if applicable in said region, would prevent the sale, reclamation, and cultivation of the public arid lands, and defeat the policy of the Government in respect thereto; that the doctrine which is applicable to conditions in said arid region, and which prevails therein, is that the waters of natural streams may be used to irrigate and cultivate arid lands, whether riparian or non-riparian, and that the priority of appropriation of such waters and the application of the same for beneficial purposes establishes a prior and superior right.

In other words, the determination of the rights of the two States *inter sese* in regard to the flow of waters in the Arkansas River is subordinate to a superior right on the part of the national government to control the whole system of the reclamation of arid lands. That involves the question whether the reclamation of arid lands is one of the powers granted to the General Government. As heretofore stated, the constant declaration of this court from the beginning is that this Government is one of enumerated powers. "The Government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication." (Story, J., in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326.) "The Government of the United States is one of delegated, limited, and enumerated powers." (*United States v. Harris*, 106 U. S. 629, 635.)

Turning to the enumeration of the powers granted to Congress by the eighth section of the first article of the Constitution, it is enough to say that no one of them by any implication refers to the reclamation of arid lands. The last paragraph of the section which authorizes Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof, is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned. The construction of that paragraph was precisely stated by Chief Justice

Marshall in these words: "We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional" — a statement which has become the settled rule of construction. From this and other declarations it is clear that the Constitution is not to be construed technically and narrowly, as an indictment, or even as a grant presumably against the interest of the grantor, and passing only that which is clearly included within its language, but as creating a system of government whose provisions are designed to make effective and operative all the governmental powers granted. Yet while so construed it still is true that no independent and unmentioned power passes to the national government or can rightfully be exercised by the Congress.

We must look beyond section 8 for Congressional authority over arid lands, and it is said to be found in the second paragraph of section 3 of article four, reading: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words "territory or other property." It is true it has been referred to in some decisions as granting political and legislative control over the Territories as distinguished from the States of the Union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. But clearly it does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits. Appreciating the force of this, counsel for the Government relies upon "the doctrine of sovereign and inherent power," adding "I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference." His

argument runs substantially along this line: All legislative power must be vested in either the State or the national government; no legislative powers belong to a State government other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act. It reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The argument of counsel ignores the principal factor in this article, to wit, "the people." Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, "we the people of the United States," not the people of one State, but the people of all the States, and article 10 reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which

any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This article 10 is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning.

* * * * *

But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters.

* * * * *

It may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State. It is undoubtedly true that the early settlers brought to this country the common law of England, and that that common law throws light on the meaning and scope of the Constitution of the United States, and is also in many States expressly recognized as of controlling force in the absence of express statute. As said by Mr. Justice Gray in *United States v. Wong Kim Ark*, 169 U. S. 649, 654:

In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor v. Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U. S. 417, 422; *Boyd v. United States*, 116 U. S. 616, 624, 625; *Smith v. Alabama*, 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent Com. 336; *Bradley, J.*, in *Moore v. United States*, 91 U. S. 270, 274.

In the argument on the demurrer counsel for plaintiff endeavored to show that Congress had expressly imposed the common law on all this territory prior to its formation into States. See also the opinion of the Supreme Court of Kansas in *Clark v. Allaman*, 71 Kan. 206. But when the States of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other States, *Pollard v. Hagan*, *supra*; *Shively v. Bowlby*, *supra*; *Hardin v. Shedd*, 190 U. S. 508, 519, and Colorado by its legislation has recognized the right of appropriating the flowing waters to the purposes of irrigation. Now the question arises between two States, one recognizing generally the common-law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water. Neither State can legislate for or impose its own policy upon the other.

A stream flows through the two and a controversy is presented as to the flow of that stream. It does not follow, however, that because Congress cannot determine the rule which shall control between the two States or because neither State can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two States. Indeed, the disagreement, coupled with its effect upon a stream passing through the two States, makes a matter for investigation and determination by this court. It has been said that there is no common law of the United States as distinguished from the common law of the several States. The contention was made in *Western Union Telegraph Company v. Call Publishing Company*, 181 U. S. 92, in which it was asserted that, as Congress having sole jurisdiction over interstate commerce had prescribed no rates for interstate telegraph communications, there was no limit on the power of a telegraph company in respect thereto. After referring to the general contention, we said (pp. 101, 102):

Properly understood, no exceptions can be taken to declarations of this kind. There is no body of Federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress. * * * Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by Congressional enactment.

What is the common law? Kent says (vol. 1, p. 471):

The common law includes those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature.

As it does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For after all, the common law is

but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes. As Congress cannot make compacts between the States, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force under our system of Government is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute. Nor is our jurisdiction ousted, even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal. In *The Paquete Habana*, 175 U. S. 677, 700, Mr. Justice Gray declared:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

And in delivering the opinion in the demurrer in this case Chief Justice Fuller said (p. 146):

Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, State law, and international law, as the exigencies of the particular case may demand.

One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri v. Illinois*, *supra*, the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law. This very case presents a significant illustration. Before either Kansas or Colorado was settled the Arkansas River was a stream running through the territory which now composes these two States. Arid lands abound in Colorado. Reclamation is possible only by the application of water,

and the extreme contention of Colorado is that it has a right to appropriate all the waters of this stream for the purposes of irrigating its soil and making more valuable its own territory. But the appropriation of the entire flow of the river would naturally tend to make the lands along the stream in Kansas less arable. It would be taking from the adjacent territory that which had been the customary natural means of preserving its arable character. On the other hand, the possible contention of Kansas, that the flowing water in the Arkansas must, in accordance with the extreme doctrine of the common law of England, be left to flow as it was wont to flow, no portion of its being appropriated in Colorado for the purposes of irrigation, would have the effect to perpetuate a desert condition in portions of Colorado beyond the power of reclamation. Surely here is a dispute of a justiciable nature which must and ought to be tried and determined. If the two States were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court.

It will be perceived that Kansas asserts a pecuniary interest as the owner of certain tracts along the banks of the Arkansas and as the owner of the bed of the stream. We need not stop to consider what right such private ownership of property might give.

In deciding this case on demurrer we said, referring to the opinion in *Missouri v. Illinois* (p. 142) :

As will be perceived, the court there ruled that the mere fact that a State had no pecuniary interest in the controversy, would not defeat the original jurisdiction of this court, which might be invoked by the State as *parens patriæ*, trustee, guardian or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between States, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution.

In the case before us, the State of Kansas files her bill as representing and on behalf of her citizens, as well as in vindication of her alleged rights as an individual owner, and seeks relief in respect of being deprived of the waters of the river accustomed to flow through and across the State, and the consequent destruction of the property of herself and of her citizens and injury to their health and comfort. The action complained of is State action and not the action of State officers in abuse or excess of their powers.

It is the State of Kansas which invokes the action of this court, charging that through the action of Colorado a large portion of its territory is threatened with disaster. In this respect it is in no manner evading the provisions of the Eleventh Amendment to the Federal Constitution. It

is not acting directly and solely for the benefit of any individual citizen to protect its riparian rights. Beyond its property rights it has an interest as a State in this large tract of land bordering on the Arkansas River. Its prosperity affects the general welfare of the State. The controversy rises, therefore, above a mere question of local private right and involves a matter of State interest, and must be considered from that standpoint. *Georgia v. Tennessee Copper Co., ante.*

This changes in some respects the scope of our inquiry. It is not limited to the simple matter of whether any portion of the waters of the Arkansas is withheld by Colorado. We must consider the effect of what has been done upon the conditions in the respective States and so adjust the dispute upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream. A little reflection will make this clear. Suppose the controversy was between two individuals, upper and lower riparian owners on a little stream with rocky bank and rocky bottom. The question properly might be limited to the single one of the diminution of the flow by the upper riparian proprietor. The lower riparian proprietor might insist that he was entitled to the full, undiminished and unpolluted flow of the water of the stream as it had been wont to run. It would not be a defense on the part of the upper riparian proprietor that by the use to which he had appropriated the water he had benefited the lower proprietor, or that the latter had received in any other respects an equivalent. The question would be one of legal right, narrowed to place, amount of flow and freedom from pollution.

We do not intimate that entirely different considerations obtain in a controversy between two States. Colorado could not be upheld in appropriating the entire flow of the Arkansas River, on the ground that it is willing to give, and does give, to Kansas something else which may be considered of equal value. That would be equivalent to this court's making a contract between the two States, and that it is not authorized to do. But we are justified in looking at the question not narrowly and solely as to the amount of the flow in the channel of the Arkansas River, inquiring merely whether any portion thereof is appropriated by Colorado, but we may properly consider what, in case a portion of that flow is appropriated by Colorado, are the effects of such appropriation upon Kansas territory. For instance, if there be many thousands of acres in Colorado destitute of vegetation, which by the taking of water from the Arkansas River and in no other way can be made valuable as arable lands producing an abundance of vegetable growth, and this transformation of desert land has the

effect, through percolation of water in the soil, or in any other way, of giving to Kansas territory, although not in the Arkansas Valley, a benefit from water as great as that which would enure by keeping the flow of the Arkansas in its channel undiminished, then we may rightfully regard the usefulness to Colorado as justifying its action, although the locality of the benefit which the flow of the Arkansas through Kansas has territorially changed. Science may not as yet be able to give positive information as to the processes by which the distribution of water over certain territory has operation beyond the mere limits of the area in which the water is distributed, but they who have dwelt in the West know that there are constant changes in the productiveness of different portions of the territory, owing, apparently, to a wider and more constant distribution of water.

* * * Will not the productiveness of Kansas as a whole, its capacity to support an increasing population, be increased by the use of the water in Colorado for irrigation? May we not consider some appropriation by Colorado of the waters of the Arkansas to the irrigation and reclamation of its arid lands as a reasonable exercise of its sovereignty and as not unreasonably trespassing upon any rights of Kansas? And here we must notice the local law of Kansas as declared by its Supreme Court, premising that the views expressed in this opinion are to be confined to a case in which the facts and the local law of the two States are as here disclosed. In *Clark v. Allaman*, 71 Kan. 206, is an exhaustive discussion of the question, Mr. Justice Burch delivering the unanimous opinion of the court. In the syllabus, which by statute (*Compiled Laws, Kansas*, p. 317, sec. 14) is prepared by the justice writing the opinion, and states the law of the case, are these paragraphs:

The use of the water of a running stream for irrigation, after its primary uses for quenching thirst and other domestic requirements have been subserved, is one of the common-law rights of a riparian proprietor.

The use of water by a riparian proprietor for irrigation purposes must be reasonable under all the circumstances, and the right must be exercised with due regard to the equal right of every other riparian owner along the course of the stream.

A diminution of the flow of water over riparian land caused by its use for irrigation purposes by upper riparian proprietors occasions no injury for which damages may be allowed unless it results in subtracting from the value of the land by interfering with the reasonable uses of the water which the landowner is able to enjoy.

In determining the quantity of land tributary to and lying along a stream which a single proprietor may irrigate the principle of equality of right with others should control, irrespective of the accidental matter of governmental subdivisions of the land.

And in the opinion, on pages 242, 243, are quoted these observations of Chief Justice Shaw in the case of *Elliott v. Fitchburg Railroad Company*, 10 Cush. 191, 193, 196:

The right to flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris*, of such a character, that whilst it is common and equal to all, through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use, may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agricultural or manufacturing purposes, would cause no sensible or practicable diminution of the benefit, to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook passing through many farms, would be of great and manifest injury to those below, who need it for domestic supply or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case and not in the former. It is, therefore, to a considerable extent a question of degree; still, the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes. * * *

That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor cannot under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the watercourse, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably. * * *

This rule, that no riparian proprietor can wholly abstract or divert a watercourse, by which it would cease to be a running stream, or use it unreasonably in its passage, and thereby deprive a lower proprietor of a quality of his property, deemed in law incidental and beneficial, necessarily flows from the principle that the right to the reasonable and beneficial use of a running stream is common to all the riparian proprietors, and so, each is bound so to use his common right, as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right, by all the proprietors. * * *

The right to the use of flowing water is *publici juris*, and common to all the riparian proprietors; it is not an absolute and exclusive right to all the water flowing past their land, so that any obstruction would give a cause of action; but it is a right to the flow and enjoyment of the water, subject to a similar right in all the proprietors, to the reasonable enjoyment of the same gift of Providence. It is, therefore, only for an abstraction and deprivation of this common benefit, or for an unreasonable and unauthorized use of it, that an action will lie.

As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable division between the riparian proprietors, she cannot complain if the same rule is administered between herself and a sister State. And this is especially true when the waters are, except for domestic purposes, practically useful only for purposes of irrigation.

* * * * *

It cannot be denied in view of all the testimony, (for that which we have quoted is but a sample of much more bearing upon the question,) that the diminution of the flow of water in the river by the irrigation of Colorado has worked some detriment to the southwestern part of Kansas, and yet when we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two States forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.

* * * * *

Summing up our conclusions, we are of the opinion that the contention of Colorado of two streams cannot be sustained; that the appropriation of the waters of the Arkansas by Colorado, for purposes of irrigation, has diminished the flow of water into the State of Kansas; that the result of that appropriation has been the reclamation of large areas in Colorado, transforming thousands of acres into fertile fields and rendering possible their occupation and cultivation when otherwise they would have continued barren and unoccupied; that while the influence of such diminution has been of perceptible injury to portions of the Arkansas Valley in Kansas, particularly those portions closest to the Colorado line, yet to the great body of the valley it has worked little, if any, detriment, and regarding the interests of both States and the right of each to receive benefit through irrigation and in any other manner from the waters of this stream, we are not satisfied that Kansas has made out a case entitling it to a decree. At the same time it is obvious that if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable division of benefits and may rightfully call for relief against the action of Colorado, its corporations and citizens in appropriating the waters of the Arkansas for irrigation purposes.

The decree which, therefore, will be entered will be one dismissing the petition of the intervenor, without prejudice to the rights of the United States to take such action as it shall deem necessary to preserve or improve

the navigability of the Arkansas River. The decree will also dismiss the bill of the State of Kansas as against all the defendants, without prejudice to the right of the plaintiff to institute new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river.

PEARCY V. STRANAHAN.

Supreme Court of the United States. April 8, 1907. No. 1.

ISLE OF PINES — FOREIGN COUNTRY. *

The Isle of Pines is a part of Cuba, and therefore a foreign country within the meaning of the enacting clause of the tariff act of 1897, and importations therefrom are subject to the tariff laws of the United States.

Mr. Chief Justice FULLER delivered the opinion of the Court.

Plaintiff brought his action in the circuit court of the United States for the southern district of New York against the then collector of the port of New York to recover the value of certain cigars seized by him, which had been brought to that port from the Isle of Pines, where they had been produced and manufactured. This seizure was made under the Dingley act, so-called (act July 24, 1897; 30 Stat., 151; ch. 11), and the regulations of the Secretary of the Treasury thereunder. The Dingley act provided for the imposition of duties "on articles imported from foreign countries," and in plaintiff's complaint it was asserted that the Isle of Pines was "in possession of and part of the United States," and hence domestic territory. The Government demurred, the demurrer was sustained, the complaint dismissed, and the case brought here on a writ of error.

Whether the Isle of Pines was a part of the United States is a conclusion of law not admitted by the demurrer. It was certainly not such before the treaty of peace with Spain, and if it became so it was by virtue of that treaty. The court takes judicial cognizance whether or not a given territory is within the boundaries of the United States, and is bound to take the fact as it really exists, however it may be averred to be. *Jones v. United States* (137 U. S., 202); *Lincoln v. United States* (197 U. S., 419; T. D. 26393); *Taylor v. Barclay* (2 Sim., 213).

August 12, 1898, a protocol of agreement for a basis for the establishment of peace was entered into between the United States and Spain, which provided:

ART. I. Spain will relinquish all claim of sovereignty over and title to Cuba.

ART. II. Spain will cede to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also an island in the Ladrões to be selected by the United States. (30 Stat., 1742.)

This was followed by the treaty of peace, ratified April 11, 1899, containing the following articles:

ART. I. Spain relinquishes all claim of sovereignty over and title to Cuba.

And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

ART. II. Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrões. (30 Stat., 1754-1755.)

In *Neely v. Henkel* (180 U. S., 109; January 14, 1901) the question was whether Cuba was a foreign country or foreign territory within the act of Congress of June 6, 1900 (31 Stat., 656, ch. 793), providing for the extradition from the United States of persons committing crimes within any foreign country or foreign territory or any part thereof, occupied or under the control of the United States. And it was held that Cuba was within this description. Mr. Justice Harlan, delivering the opinion of the court, said:

The facts above detailed make it clear that within the meaning of the act of June 6, 1900, Cuba is foreign territory. It cannot be regarded, in any constitutional, legal, or international sense a part of the territory of the United States.

While by the act of April 25, 1898, declaring war between this country and Spain, the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several States to such extent as was necessary, to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United States, but only for the purpose of compelling the relinquishment by Spain of its authority and government in that island and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the Government, by the joint resolution of April 20, 1898, expressly disclaimed any purpose to exercise sovereignty, jurisdiction, or control over Cuba "except for the pacification thereof," and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view and, so far as the court is informed by the public history of the relations of this country with that island, nothing has been done inconsistent with the declared object of the war with Spain.

Cuba is none the less foreign territory, within the meaning of the act of Congress because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

It is true that as between Spain and the United States — indeed, as between the United States and all foreign nations — Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs, and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.

If, then, the Isle of Pines was not embraced in Article II of the treaty, but was included within the term "Cuba" in Article I, and therefore sovereignty and title were merely relinquished, it was "foreign country" within the Dingley act.

This inquiry involves the interpretation which the political departments have put upon the treaty. For, in the language of Mr. Justice Gray, in *Jones v. United States*, "who is the sovereign, *de jure* or *de facto* of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens, and subjects of that government."

By the joint resolution of April 20, 1898 (30 Stat., 738), entitled "Joint resolution for the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect," the United States disclaimed any disposition or intention to exercise sovereignty or control over Cuba, except in the pacification thereof, and asserted its determination, when that was accomplished, to leave the control of the island to its people. What was the signification of the word "Cuba" at that time?

The record of the official acts of the Spanish Government from 1774 to 1898 demonstrates that the Isle of Pines was included in the political division known as "Cuba." The first official census of Cuba, in 1774; the "Statistical plan of the ever faithful isle of Cuba for the year 1827;"

the establishment by the governor-general, in 1828, of a colony on the island; the census of 1841; the budgets of receipts and expenses; the census for 1861, 1877, 1887, and so on, all show that the Isle of Pines was, governmentally speaking, included in the specific designation "Cuba" at the time the treaty was made and ratified, and the documents establish that it formed a municipal district of the province of Havana.

In short, all the world knew that it was an integral part of Cuba, and in view of the language of the joint resolution of April 20, 1898, it seems clear that the Isle of Pines was not supposed to be one of the "other islands," ceded by Article II. Those were islands not constituting an integral part of Cuba, such as Vieques, Culebra, and Mona Islands adjacent to Porto Rico.

Has the treaty been otherwise interpreted by the political departments of this Government? The documents to which we have had access, with the assistance of the presentation of the facts condensed therefrom in the brief for the United States, enable us to sufficiently indicate the situation in that regard, and we think it proper to do this, notwithstanding the determination of the case turns at last on a short point requiring no elaboration.

The Spanish evacuated Havana January 1, 1899, and the government of Cuba was transferred to a military governor as the representative of the President of the United States. The President ordered, August 17, 1899, a census to be taken as a first step toward assisting "the people of Cuba" to establish "an effective system of self-government." In accomplishing this the island was divided into 1,607 enumeration districts. Three enumerators took the census of the Isle of Pines, which was described as a municipal district of the judicial district of Bejucal, in the province of Havana. The report on the census, as published by the War Department in 1900, stated:

The Government of Cuba has jurisdiction not only over the island of that name, but also over the Isle of Pines, lying directly to the south of it, and more than a thousand islets and reefs scattered along its northern and southern coasts. * * * The Isle of Pines, with an area of 840 square miles, is a municipal district of the province of Havana. * * * The total population of Cuba, including the Isle of Pines and the neighboring keys, was, on October 16, 1899, 1,572,797.

The population tables give the population of the Isle of Pines as a municipal district of Havana province, and so of the statistics as to rural population; sex, nativity and color; age and sex; birthplace; conjugal condition; school attendance; foreign whites; number and size of families;

dwellings of families — these and like items are given as to the Isle of Pines as under the province of Havana.

In August, 1899, the military governor of Cuba appointed a mayor and first assistant mayor of the Isle of Pines. On June 16, 1900, an election was held throughout the island, at which the people of Cuba in all their municipalities elected their municipal officers, participated in by the inhabitants of the Isle of Pines, as is stated in the report of the Committee on Foreign Relations, Senate Document No. 205, Fifty-ninth Congress, though this was denied in a minority report. A constitutional convention was called and the inhabitants of the Isle of Pines participated in the election of delegates thereto, September 15, 1900. The convention concluded its work by October 1, 1901, and December 31, 1901, an election was held to choose governors of provinces, provincial councilors, members of the house of representatives, and presidential and senatorial electors, under an order of General Wood of October 14, 1901, No. 218, approved by the War Department, which divided the province of Havana into four circuits, the third being composed of several ayuntamientos, of which the Isle of Pines was one. February 24, 1902, the electors met, chose senators, and elected Senor Palma President, and Senor Romero Vice-President.

The government was transferred to Cuba May 20, 1902, and in making the transfer, and declaring the occupation of Cuba by the United States and the military government of the island to be ended, the military governor wrote to "the President and Congress of Cuba," among other things:

It is understood by the United States that the present government of the Isle of Pines will continue as a *de facto* government, pending the settlement of the title to said island by treaty, pursuant to the Cuban constitution and the act of Congress of the United States approved March 2, 1902[1].

On the same day President Palma replied:

It is understood that the Isle of Pines is to continue *de facto* under the jurisdiction of the Government of the Republic of Cuba, subject to such treaty as may be entered into between the Government of the United States and that of the Cuban Republic, as provided for in the Cuban constitution and in the act passed by the Congress of the United States, and approved on the 2d of March 1901. (31 Stat., 897.)

At that date the Isle of Pines was actually being governed by the Cubans through municipal officers elected by its inhabitants, and a governor of the province of Havana, councilors, etc., in whose choice they had participated. And see *Neely v. Henkel* (180 U. S., 109, 117, 118).

February 16, 1903, the Senate of the United States, by resolution, requested the President "to inform the Senate as to the present status of the Isle of Pines, and what government is exercising authority and control in said island."

In reply, the President submitted a report from the Secretary of War, which stated:

The nature of the *de facto* government under which the Isle of Pines was thus left pending the determination of the title thereof by treaty is shown in the following indorsement upon a copy of the said resolution by the late military governor of Cuba:

[Here follows the indorsement, dated February 20, 1903, of which the following is a part:]

At the date of transfer of the Island of Cuba to its duly elected officials the Isle of Pines constituted a municipality included within the municipalities of the province of Havana and located in the judicial district of Bejucal. The government of the island is vested in its municipal officers, subject to the general control of the civil governor of the province of Havana, who is vested under the constitution of Cuba with certain authority in the control of municipal affairs. Under the military government of Cuba the Isle of Pines was governed by municipal officials, subject to the general authority of the civil governor, who received his authority from the governor-general. The Isle of Pines, as it had existed under the military government, was transferred as a *de facto* government to the Cuban Republic, pending the final settlement of the status of the island by treaty between the United States and Cuba. The action taken by the military government was in accordance with telegraphic orders from the honorable the Secretary of War. The government of the island to-day is in the hands of its municipal officers, duly elected by the people under the general control of the civil governor of the province of Havana and the Republic of Cuba. As I understand it, the government of the Isle of Pines is vested in the Republic of Cuba, pending such final action as may be taken by the United States and Cuba looking to the ultimate disposition of the island. No special action was taken to protect the interests of the citizens of the United States who have purchased property and have settled in the Isle of Pines, for the reason that no such action was necessary. All Americans in the island are living under exactly the same conditions as other foreigners, and if they comply with the laws in force it is safe to say that they will not have any difficulty or need special protection. At the time these people purchased property they understood distinctly that the question of ownership of the Isle of Pines was one pending settlement, and in locating there they took the risks incident to the situation.

We are justified in assuming that the Isle of Pines was always treated by the President's representatives in Cuba as an integral part of Cuba. This was indeed to be expected, in view of the fact that it was such at the

time of the execution of the treaty and its ratification, and that the treaty did not provide otherwise in terms, to say nothing of general principles of international law applicable to such coasts and shores as those of Florida, the Bahamas, and Cuba. Hall (4th ed.), 129, 130; *Louisiana v. Mississippi* (202 U. S., 1, 53); *The Anna* (5 C. Rob., 273).

In August, 1902, the Treasury Department decided (T. D. 23922) that duties should be assessed on goods coming from the Isle of Pines at the same rates as on similar merchandise imported from other places. On July 2, 1903, a treaty with Cuba was signed, relinquishing any claim by the United States to the Isle of Pines under the treaty of peace; but this failed of ratification, and on March 2, 1904, another treaty was signed, which relinquished all claim of title under that treaty.

November 27, 1905, the Secretary of State wrote an American resident of the Isle of Pines:

The treaty now pending before the Senate, if approved by that body, will relinquish all claim of the United States to the Isle of Pines. In my judgment the United States has no substantial claim to the Isle of Pines. The treaty merely accords to Cuba what is hers in accordance with international law and justice.

At the time of the treaty of peace, which ended the war between the United States and Spain, the Isle of Pines was and had been for several centuries a part of Cuba. I have no doubt whatever that it continues to be a part of Cuba, and that it is not and never has been territory of the United States. This is the view with which President Roosevelt authorized the pending treaty, and Mr. Hay signed it, and I expect to urge its confirmation.

There are some letters of an Assistant Secretary of War or written by his direction, and other matters, referred to, which we do not regard as seriously affecting the conclusion that the Executive has consistently acted on the determination that the United States had no substantial claim to the Isle of Pines under the treaty.

The only significant legislative action is found in the proviso of the act of March 2, 1901, the army appropriation act (31 Stat., 895, ch. 803), commonly called the Platt amendment (897), which reads:

Provided further, That in fulfillment of the declaration contained in the joint resolution approved April twentieth, eighteen hundred and ninety-eight, entitled "For the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect," the President is hereby authorized to "leave the government and control of the island of Cuba to its people," so soon as a government shall have been established in said island

under a constitution which, either as a part thereof or in an ordinance appended thereto, shall define the future relations of the United States with Cuba, substantially as follows:

Then follow eight clauses, of which the sixth is —

VI. That the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty.

It appears that certain American citizens, asserting interests in the Isle of Pines, had contended that it belonged to the United States under the treaty; and the sixth clause of the Platt amendment, while not asserting an absolute claim of title on our part, gave opportunity for an examination of the question of ownership and its settlement through a treaty with Cuba. The Republic of Cuba has been governing the isle since May 20, 1902 — the present situation need not be discussed — and has made various improvements in administration at the suggestion of our Government; but Congress has taken no action to the contrary of Cuba's title as superior to ours.

It may be conceded that the action of both the political departments has not been sufficiently definite to furnish a conclusive interpretation of the treaty of peace as an original question, and as yet no agreement has been reached under the Platt amendment. The Isle of Pines continues at least *de facto* under the jurisdiction of the Government of the Republic of Cuba, and that settles the question before us, because, as the United States have never taken possession of the Isle of Pines as having been ceded by the treaty of peace, and as it has been and is being governed by the Republic of Cuba, it has remained "foreign country" within the meaning of the Dingley act, according to the ruling in *De Lima v. Bidwell* (182 U. S., 1) and cases cited; *United States v. Rice* (4 Wheat., 246). There has been no change of nationality for revenue purposes, but, on the contrary, the Cuban Government has been recognized as rightfully exercising sovereignty over the Isle of Pines as a *de facto* government until otherwise provided. It must be treated as foreign, for this Government has never taken, nor aimed to take, that possession in fact and in law which is essential to render it domestic.

Judgment affirmed.

Mr. Justice McKENNA concurred in the judgment; Mr. Justice WHITE and Mr. Justice HOLMES concurred specially; Mr. Justice MOODY took no part.

Mr. Justice WHITE, concurring.

My reasons for agreeing to the conclusion announced by the court are separately stated to prevent all implication of an expression of opinion on my part as to a subject which in my judgment the case does not require and which, as it is given me to see it, may not be made without a plain violation of my duty.

The question which the case raises, by way of a suit to recover duties paid on goods brought from the Isle of Pines, is whether that island, by the treaty with Spain, became a part of the United States, or was simply left or made a part of the Island of Cuba, over which the sovereignty of Spain was relinquished.

I accept the doctrine which the opinion of the court announces, following *Jones v. United States* (137 U. S., 202), that "who is the sovereign *de jure* or *de facto* of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as other officers, citizens, and subjects of that government." That the legislative and executive departments have conclusively settled the present status of the Isle of Pines as *de facto* a part of Cuba and have left open for future determination the *de jure* claim, if any, of the United States to the island, as the court now declares, is to me beyond possible contention. Thus, by the amendment to the act of 1891, which was enacted to determine the *de facto* position of the island and to furnish a rule for the guidance of the executive authority in dealing in the future with the island, it was expressly provided "that the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty." So, also, when the Island of Cuba was turned over to the Cuban Government by the military authority of the United States, that Government was expressly notified by such authority, under the direction of the President, that, whilst the *de facto* position of the Isle of Pines as a part of Cuba was not disturbed, it must be understood that its *de jure* relation was reserved for future determination by treaty between Cuba and the United States. And this notification and relation was in terms accepted by the President of the Republic of Cuba. If the opinion now announced stopped with these conclusive expressions, I should of course have nothing to say. But it does not do so. Although declaring that the *de facto* position of the Isle of Pines as resulting from legislative and executive action is binding upon the courts, and although referring to the conclusive settlement of that *de facto* status and the reservation by the legislative and executive departments of the determi-

nation of the *de jure* status for future actions, the opinion asserts that it is open and proper for the court to express an opinion upon the *de jure* status — that is, to decide upon the effect of the treaty. In doing so, it is declared that all the world knew that the Isle of Pines was an integral part of Cuba, this being but a prelude to an expression of opinion as to the rightful construction of the treaty. To my mind any and all expression of opinion concerning the effect of the treaty and the *de jure* relation of the Isle of Pines is wholly unnecessary and can not be indulged in without disregarding the very principle upon which the decision is placed — that is, the conclusive effect of executive and legislative action. In other words, to me it seems that the opinion, whilst recognizing the force of executive and legislative action, necessarily disregards it. This follows, because the views which are expressed on the subject of the meaning of the treaty amount substantially to declaring that the past action of the executive and legislative departments of the government on the subject have been wrong, and that any future attempt by those departments to proceed upon the hypothesis that the *de jure* status of the island is unsettled will be a violation of the treaty as now unnecessarily interpreted.

Mr. Justice HOLMES concurs.

UNITED STATES OF AMERICA V. C. A. BIDDLE.

United States Court for China.

Ruling on the demurrer to the information.

Term "Common Law" Defined.

The information in this case charges C. A. Biddle with the crime of obtaining money under false pretences. A demurrer to the information has been filed on the ground that the facts alleged in the information do not constitute an offence. The demurrer is based upon the contention that obtaining money under false pretences is a statutory and not a common-law offence, and since there is no United States statute on the subject, it is not a crime to obtain money under false pretences in China.

The law defining and providing for the punishment of the crime of obtaining money under false pretences is found in 30 Geo. II, C. 24, Sec. 1, which was enacted to supply the defects of the common law relating to cheats. The American statutes on obtaining money under false pretences follow in substance the English statute. (Bishop, *New Criminal Law*, Vol. II, book X, chap. XXX.)

The question raised by the demurrer to the information is as follows: Is the above-mentioned provision of the English law included in the "common law" as the term is used in Section 4 of the Act of June 30, 1906, establishing this Court? This calls for an interpretation of the term as used in the statute.

Chief Justice Marshall, in a ruling made during the trial of Aaron Burr, held that the term "common law" referred to

those general principles and those general usages which are to be found, not in the legislative acts of any particular State, but in that generally recognized and long-established law which forms the substratum of the laws of every State. (Hinkley, *American Consular Jurisdiction in the Orient*, p. 51-3.)

This is an accurate general definition of the term common law as it existed in the United States at the time the eminent jurist gave this opinion, but in order to meet the practical demands of the situation which now confronts the newly established United States Court for China, it is necessary to descend more into detail and to define the meaning of the term with greater particularity.

When our ancestors came to the New World they claimed the common law of England as their birthright and brought it with them, except such parts as were judged inapplicable to their new conditions. The common law of England is the unwritten law as distinguished from the written or statute law, and in its ordinary acceptation includes those general customs which pervade the whole realm, and particular laws which have been by degrees added thereto.

The common law as introduced into the United States embraces those general principles of the common law of England and those English statutes passed in aid thereof, which were applicable to the new conditions and circumstances existing in the American colonies at the date of the change of sovereignty. (Mr. Justice Story in *Petterson v. Winn*, 5 Peters 242; see also *Commonwealth v. Knowlton*, 2 Massachusetts 530.)

This is also the view taken by Prof. Bishop in his recent work on Criminal Law, wherein he says:

The common law of England as modified by statutes and including the law as administered under the equity, admiralty, and ecclesiastical tribunals, travelled with the original colonists to this country; and here so much of it as was adapted to their altered situation and circumstances, yet no more, became and thenceforward constituted our American common law, but when it was thus adopted by us we were not a nation. Not even the Revolution, but the Constitution of the United States gave us nationality. The Revolution and the Constitution did not annihilate any law with which they were not in conflict. The laws existing when each transpired remained such in their several localities,

and so they would have done if the colonies and the States had been politically annihilated. The result is that the United States has no common law within the territorial limits of the States, and all unwritten law within them is State law, yet in reason it is obvious that there are circumstances under which, not a national common law, but the somewhat varying local laws of each of the several States constitute an unwritten rule for the tribunals of the United States. (Bishop, *New Criminal Law*, vol. 1, sec. 190-2; *Minor, Institutes* 34.)

In America the United States courts, when called upon to interpret and apply the common law, are not confronted with the difficulty which now confronts this Court, because there a United States Court has only to administer the common law of the State or States in which the matter pending before the court originated. The common law of each State is usually well defined. Here we have the situation of a United States Court sitting outside the territorial limits of the States and outside the territorial limits of the Nation itself, which is called upon to interpret and apply the common law.

It is readily seen that this gives rise to difficulties which do not exist in the United States courts sitting in America. The difficulty was recognized by the Honorable Caleb Cushing, who as commissioner negotiated the Treaty of July 3rd, 1844, and who subsequently, as Attorney-General of the United States, delivered an opinion upon the meaning of the term "common law" as used in the Act of Congress of August 11th, 1844, which was passed pursuant to said Treaty. The term "common law" is used in the statute of August 11th, 1848, in the same sense in which it is used in the statute of June 30th, 1906.

In the above-mentioned opinion Mr. Cushing discusses the subject as follows:

The common law: In this respect, the statute furnishes a code of laws for the great mass of civil or municipal duties, rights, and relations of man, such as, within the United States, are of the resort of the courts of several States. Some general code in these respects became necessary, because the law of the United States, — that is, the federal legislation, — does not include those matters, and, of itself, would be of no avail towards determining any of the questions of property, succession and contract, which constitute the staple matter of ordinary life. For such of the States as were founded in whole or chief part by colonists from Great Britain and Ireland, or their descendants, the law of England, as it existed in each of those States at the time of their separation from Great Britain, with such modifications as that law had undergone by the operation of colonial adjudication, legislation, or usage, became the common law of such independent State. Meantime, in addition to many changes, differing among themselves, which the common law underwent in each of the colonies before it became a State, that common law has been yet more largely changed by the legislation and judicial constitution of each of the States. Hence, it was not enough to enact that the

common law should intervene to supply, in China, deficiencies in the law of the United States. For the question would be sure to arise: What common law? The common law of England at the time when the British colonies were transmuted into independent republican States? Or the common law of Massachusetts? Or that of New York, or Pennsylvania, or Virginia? For all these are distinct, and in many important respects diverse, "common law." (Opinions of Attorneys-General of the United States, vol. 7, pages 503-4.)

The foregoing brilliant discussion of the subject by Mr. Cushing at once indicates the difficulties of, and the necessity for, a definite and comprehensive interpretation of the term as used in the law. For the reasons pointed out in the foregoing discussions, it is well-nigh impossible to include in a single statement a definition of the common law which will be comprehensive enough to cover the entire field.

It is believed, however, that the authorities warrant the following holding: The term "common law" as used in the statute is interpreted to mean those principles of the common law of England and those statutes passed in aid thereof, including the law administered in the equity, admiralty and ecclesiastical tribunals, which were adapted to the situation and circumstances of the American colonies at the date of the transfer of sovereignty as modified, applied and developed generally by the decisions of the State courts and by the decisions of the United States courts, and incorporated generally into the statutes and constitutions of the States.

I hold, therefore, that the above-mentioned English statute is a part of the common law within the meaning of the term as used in the United States Statute establishing this Court, hence the demurrer is overruled.

Signed: L. R. WILFLEY,

Judge of the United States Court for China.

SHANGHAI, March 6, 1907.

BOOK REVIEWS

A History of Diplomacy in the International Development of Europe.

By David Jayne Hill, LL.D., Vol. 1.¹ The Struggle for Universal Empire, with maps and tables. London: Longsmans, Green & Co. pp. xxiii, 481. 1905.

To many who have had the pleasure of listening to Doctor Hill, in his discourses on European diplomatic history, this first volume of *A History of European Diplomacy* will be a welcome and treasured book. It is the first of a series of six volumes upon the subject, and is written in that clear and beautiful style always characteristic of Doctor Hill's speech and writings. His presentation and analysis of historical facts and incidents, and the proofs upon both sides of controverted questions, are presented fairly and justly. One feels in reading this book that the author's treatment of his subject, of persons and groups, and of events, is calm and judicial, as distinguished from that of one having a preconceived theory or partisan bias. There is an abundance of facts submitted, carefully and laboriously gathered from original sources, marshalled in proper order and sequence, with due weight given to each, and logical conclusions are drawn from the facts presented. Doctor Hill is a student and has written his book for students. He not only states his premises and proofs, but at the end of each chapter gives a full "list of authorities, documentary and literary," thus enabling the reader to investigate original sources for himself, and adding immeasurably to the value of the work to students. It is also worthy of note that the book contains very excellent maps, so placed that they can be unfolded and glanced at constantly while reading the text. The use of maps in reading history tends to fix the matter clearly in the mind, and his arrangement of the maps makes it possible to look at the field without delaying the reading. This feature shows the careful attention to details characteristic of a master mind.

The author begins his work by clearly defining his field of inquiry, to which he strictly adheres. He starts with the "root of the matter." In reference to this he says,

¹ Volume II. was reviewed by Dr. Needham in the April issue of this JOURNAL.

It is, in truth, in the wealth of materials that a writer on diplomatic history finds his chief embarrassment. With the conviction that history is of value in proportion as it affords explanation, it has seemed best to adhere closely to the main current of casualty in the development of the existing system of European relations. It is, accordingly, as the title indicates, the history of diplomacy only as related to the international development of Europe as a whole, which constitutes the subject of the present work.

As in the study of the Roman law, one is likely to begin with the codification of Justinian, forgetting that behind that splendid work there are years of growth and development, creating law by customs and judicial opinions, settling controversies which made the Code of Justinian possible, so,

it is customary to regard the Congress and Peace of Westphalia as the starting point of European diplomacy. * * * The truth is, that the Congress and Peace of Westphalia, while furnishing the international code of Europe, were the fruits of a long period of preparation whose movements provide the only key to the meaning of that code.

Therefore, Doctor Hill again says,

It is necessary, * * * if one would thoroughly comprehend the diplomacy of modern times, to return to the real point of origin of those elements which together constitute the present public law and international usages of Europe, and to trace their development step by step, down to the period of their final organization as a system.

This first volume, complete in itself, is designated "The Struggle for Universal Empire"; the second volume treats of "The Establishment of Territorial Sovereignty," and these "may be regarded as indicating the foundations of modern diplomacy." This first volume begins with the practical unity of Europe under the Roman Empire. Surrounded by barbarian peoples, there was small opportunity for the exercise of the art of diplomacy except in a minor way between the cities and provinces constituting the Empire. After noting the extent and imperial power of this Empire, its gradual decadence, and finally its dismemberment and reorganization into small kingdoms, there begin the development and practice and the art of diplomacy, tending to bring about peace and war; for it must be remembered that diplomacy has not always been the handmaid of peace.

The rise and spread of Christianity, the marvelous organization of the Roman Catholic Church, its influence over the broken fragments of the Roman Empire and the barbarian nations to which it sent missionaries, is told dispassionately and with great fidelity to the truths of history.

The church organization, founded upon the model of the Roman Empire, became a contending force for power and one of the great agencies in the development of the art of diplomacy. In the opening of the very interesting chapter upon "The Empire under the Carolingians" (chapter III), the story of the coronation of Charles the Great is told, concluding with these words portraying the contest which was to follow:

The two figures before the high altar of St. Peter's on that Christmas day form a symbolical picture of the whole course of history since the time of the Cæsars. The Roman and the German, the overshadowing past and the potential present, the universal and the individual, the majesty of law and the vigor of liberty, the world of the spirit and the world of actuality, imperial right and barbarian energy, — all these are present, and all are henceforth to be combined as if swallowed up in one new creation. But it is the German who kneels in pious devotion, the present which humbles itself before the past, the individual who feels the power of the universal, the vigor of liberty which yields to the majesty of law, the actual which seeks strength from the spiritual, and the barbarian who has been conquered by the Empire. It is the Roman who bestows the crown, the Roman who speaks in the name of the divinity, the Roman whose transfigured republic is to profit by Rome's latest conquest; for after centuries of suffering, toil, and tragedy, it is the triumph of Rome's work which is before us.

Following the collapse of the Empire under the Carolingians, the rise and history of the Holy Roman Empire of the German nation is given, marking

the beginning of a new era and a new order of ideas, in which the most antagonistic elements were to be brought into the most intimate relations. The efforts to reconcile their contradictions, destined to a failure not less tragic than the disruption of the Empire of Charles the Great, constitute the principal interest of the period."

The history of the Venetians as diplomatists is especially interesting and instructive. This mediæval diplomacy won great victories and established practices and customs in reference to diplomatic agents and negotiations that may well be studied carefully by the civilized governments of to-day.

What Doctor Hill says about the embarrassment in writing a history of diplomacy within proper bounds, on account of "the wealth of materials," also presents itself to a reviewer of his book — one hardly knows where to stop. The general reader will find himself delighted with its pages, and the student will be refreshed and invigorated by its careful study. One sees in a panorama the rise, out of conditions creating it, of the profession, the art, and the science which we now know as modern diplomacy. It came not by design, but by necessity; it came "without

observation " until, in a better perspective, we now behold, in this review of human actions and events, the slowly rising foundations of the kingdom of mind and of peace — Diplomacy and International Law.

CHARLES WILLIS NEEDHAM.

Traité de Droit Public International. By A. Mérignhac. Two volumes, 10 francs each. Librairie Générale de Droit et de Jurisprudence, 20 Rue Soufflot, Paris, France.

The second volume of the above entitled work has just come from the press, the first volume having been published in 1905. While the author is, like his father, an eminent authority on the civil law, his greatest claim upon our attention is because of the valuable work he has done in the international field. The most interesting and profound publication relating to the theory of arbitrations (*De l'Arbitrage International*) was written by him, as well as the most philosophic exposition of the work of The Hague Conference of 1899 (*La Conférence Internationale de la Paix*). From the standpoint of an up-to-date study of the condition of international law, the volume under consideration is no less valuable, its distinguishing feature being its review as of to-day of the questions which are most discussed in the world of the law of nations. This is manifest from a hasty glance at its contents.

The first volume discusses the foundations and general theory of international law, with an important historical review; the sources of such law; the fundamental principles; the primary rights of the state; the influences bearing upon its destiny, particularly the relations existing between states in their several aggroupments — European and American. Special attention is given, as might be expected, to the question of arbitration, and the most recent cases submitted to The Hague Court, beginning with the Pious Fund of the Californias sent there by the joint action of the United States and Mexico, receive their proper attention.

In the second volume the state, as a subject of public international law, receives special study, and the condition of states as composite or federal are carefully investigated, as also the positions of certain of them with relation to international guaranties and protectorates. The status of diplomatic and consular representatives receives due treatment, while the territorial question in all its phases is fully discussed. Treaties of every kind receive proper consideration.

The person who would desire to have a thorough working knowledge

of the questions now existent in the field of international law and diplomatic action and pressing for settlement cannot do better than to thoroughly acquaint himself with these volumes, covering as they do the normal attitude of states — the peaceful one.

JACKSON H. RALSTON.

Le Droit International, Les Principes, Les Théories, Les Faits. By Ernest Nys. Three volumes (Vol. 3 in two parts). Albert Fontemoing, Paris, France, publisher.

The present year concludes this important publication, its distinguished author having already marked his career by the production of valuable contributions to what we may now fairly call the science of international law, many appearing in the *Revue de Droit International*, of which he is an editor.

The work opens with a philosophic discussion of the origin and growth of international law, following its development as parallel with that of civilization. Everywhere he recognizes that the last word has not been said, the science growing with the growth of communities.

Mr. Nys follows with a historical review of the work of the authors who successively have contributed to the development of the science, then discusses the ancient and modern conception of a state, its recognition, and states as sovereign or non-sovereign entities. The bases and modes of formation of the law receive full and interesting discussion as well as the attempts to codify it. The bibliography of the subject is given adequate review.

An important section is devoted to the discussion of states, their characteristics, the theory of nationalities, their classification and extinction.

The territory of a state as to its frontiers, its waters, lakes, rivers, straits, canals — its littorals and aerial control, conclude the work of the first volume.

The second volume opens with a treatment of the manner of acquisition of territory, sovereignty over colonies and non-civilized regions, following with control of international waters. The laws of the high seas receive thorough discussion, after which is given an important disquisition upon the essential rights of states, members of the international society, with relation to each other, while diplomatic and consular rights and privileges are carefully examined.

The third volume (in two parts) discusses negotiations, conferences,

congresses, treaties, and the amicable solution of differences, following with the incidents and laws of war. Neutrality and the rights and duties of neutrals receive full consideration, the work terminating naturally with the conclusion of peace.

This review, necessarily imperfect, may serve to furnish some idea of the scope of this important work, but does not do justice to its philosophic spirit. The writer has made a contribution of great value to the student of international law.

JACKSON H. RALSTON.

A Treatise on the Law of Naturalization of the United States. By Frederick Van Dyne, LL. M. Washington: Frederick Van Dyne. 1907.

The author of this work now occupies an important post in the American consular service. Three years ago, while holding the position of assistant solicitor of the Department of State, he published a work on Citizenship of the United States, a work which was at the time highly commended by competent critics and which those who have since used it have found to be an excellent manual. It was natural that Mr. Van Dyne should follow up his volume on citizenship with a treatise on naturalization. The two topics, though distinct, are so closely related, and so constantly blend, the one into the other, that they may be said scientifically to form component parts of one entire subject.

Mr. Van Dyne remarks in his preface that

one of the most creditable achievements of the administration of President Roosevelt was the reformation of our naturalization laws.

Under the previously existing statutes, enacted more than a hundred years ago, when the population of the country was less than four millions and the number of immigrants small, the safeguards provided against fraud were slight, and as immigration increased they came to be less and less effective. Spurious certificates were so easily obtained and so shamelessly employed that the matter became a public scandal. Year after year Presidents brought it to the attention of Congress; but it was not till 1905 that a remedial step was taken. In that year, on the suggestion, it is understood, of the Honorable Oscar S. Straus, now Secretary of Commerce and Labor, who in his two terms of service as minister to Turkey had had ample experience of the evils of lax naturalization, President Roosevelt appointed a commission to investigate the subject

of naturalization and to recommend legislation. The bills drafted by this commission were not enacted into law, but the commission's recommendations formed the basis of the act of Congress which received the approval of the President on June 29, 1906. This act, as Mr. Van Dyne remarks, effects a revolution in our system of naturalization, giving to the Federal Government effective control of the subject through a central bureau in the Department of Commerce and Labor, and throwing about the process of admission to citizenship wisely contrived safeguards. Moreover, by the act of Congress of March 2, 1907, further and important modifications have been made of the law relating to naturalization.

All this new legislation, as well as the old, is exhaustively analyzed and discussed in the present treatise, which is specially designed to meet the needs of the judges and clerks of naturalizing courts, of United States attorneys who appear in naturalization proceedings, of diplomatic and consular officers, and of officials having to do with immigration and other matters in which questions of citizenship and naturalization are involved. After defining naturalization, Mr. Van Dyne discusses the power to regulate it and the character of the process. He shows what courts are authorized to grant naturalization, and what the duties are that are imposed upon the courts in connection with the discharge of this function. The entire proceeding is described step by step, including the declaration of intention, the petition for admission to citizenship, the production of witnesses, and the final hearing. The conditions of naturalization are fully set forth and explained, as well as the circumstances in which naturalization may be impeached. Separate chapters are given, respectively, to the subject of naturalization by the naturalization of parents, to that of naturalization by marriage, and to that of collective naturalization, whether by conquest, by treaty, by the admission of a Territory to statehood, or by special act of Congress. Chapters are also given to the subjects of expatriation and passports; and the attitude of foreign governments toward their citizens who have been naturalized in the United States is disclosed in detail, beginning with Austria-Hungary and ending with Turkey, in a list of seventeen countries.

In an appendix, there is a collection of documents which must prove to be of great practical value. These embrace the laws of the United States relating to naturalization and expatriation, including the appropriate sections of the Revised Statutes and the acts of June 29, 1906, and March 2, 1907; the eleven naturalization treaties to which the United States is a party; the executive orders of April 6 and April 8, 1907,

amending the instructions to diplomatic officers and the consular regulations relative to expatriation, citizenship, naturalization, and passports; the naturalization regulations promulgated by the Department of Commerce and Labor; a list of the courts having jurisdiction to naturalize aliens; and a list of foreign countries and their rulers.

Professor Munroe Smith, himself the author of one of the best monographs in English on citizenship, said of Mr. Van Dyne's work on that subject that there was "little to criticise either in his inclusions or his exclusions." The same thing may well be affirmed of the present volume, on naturalization. It is full of useful matter, selected and put together with sense and judgment and with intelligent appreciation of its significance. Moreover, much of the materials which it contains cannot be conveniently consulted elsewhere; and the work may fairly be pronounced indispensable to those who have to deal, theoretically or practically, with the subject to which it relates.

J. B. MOORE.

Proceedings of the National Arbitration and Peace Congress, New York, April, 1907. Edited by the Secretary, Robert Erskine Ely, 23 West Forty-fourth street, New York city. A review of these proceedings will be found in the Editorial Comment of this number at page 727.

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APPENDIX

(The following list forms part of the article on International Congresses and Conferences of the last century as forces working towards the solidarity of the world, by the Honorable Simeon E. Baldwin, which is printed at page 565 of this JOURNAL.)

List of memorable international conferences, congresses, or associations of official representatives of governments, exclusive of those mainly concerned in dealing with the results of a particular war.

1826. Congress of Panama, June 22 to July 15. Four powers represented. Favored the abolition of privateering. Adopted a scheme for biennial congresses of the same powers (and annual ones in time of war), which was not ratified.

1830-1831. Conference of London (began December 30) between five powers establishing the perpetual neutrality of Belgium.

1847-1848. Congress of Lima (December 11 to July 8) to form an alliance of American republics. Five powers represented. A confederation agreed on, and a postal convention, but never ratified.¹

1851. First International Sanitary Conference, held at Paris. Twelve powers represented. A convention affecting the navigation of the Mediterranean executed by five powers. Later conferences held in Paris in 1859; Florence, 1867; Vienna, 1874; Washington, 1881; Rome, 1885; Venice, 1892; Paris, 1893 and 1897.

1853. Maritime Conference for the Adoption of a Uniform System of Meteorological Observations at Sea. Held at Brussels, August 23 to September 8, on the initiative of the United States.

1853. General Conference as to Statistics, held at Brussels, on the initiative of Belgium. Twenty-six powers were represented. A permanent international bureau set up, at Rome, since 1885 (Institut international de Statistique). Publishes a bulletin. Meets biennially.

1856. Congress of Santiago as to a Continental Treaty of Alliance. Three powers represented. Treaty signed, *ad referendum*, but never ratified.²

¹ Calvo, *Droit Int.*, I, 85.

² Calvo, *Droit Int.*, I, 89.

1857. Conference of Copenhagen to capitalize the Sound Dues claimed by Denmark. Sixteen powers represented. Agreement with Denmark reached, to which most of the maritime powers acceded, she receiving 35,000,000 rix-dollars.

1861. Conference at Hanover to secure the Abolition of the Tax by Hanover on the Navigation of the Elbe. Seventeen powers represented. Convention signed commuting Hanoverian right for about 2,800,000 thalers.

1863. Conference of London between five powers to guarantee the neutrality of the United States of the Ionian Islands, after their reunion with Greece.

1863. Conference of Brussels, July 15, to compound with the Netherlands for the Free Navigation of the Scheldt. Convention signed by twenty-one powers, for composition of about 17,000,000 florins.

1863. Congress of German sovereigns (Prussia excepted) at Frankfurt, August 16. Project of Austria for one federal state considered.

1863. Conference of Paris on a Postal Union. Led to that of Berne in 1874.

1863. Conference of four powers on Sugar Duties.

1864. Conference of Geneva, August 20, as to promoting humanity in war. Sixteen powers represented. Resulted in the Geneva Conventions of 1864 and 1868 as to the Red Cross, between thirty-one powers. A permanent international committee established. Eighth "International Red Cross Conference" held in London in June, 1907.

1864. Congress of Lima, October 28 to November 14, to abolish war in South America, substitute arbitration, and devise an alliance. Eight powers represented. Treaty of alliance signed, but never ratified.³

1864. First International Conference on Weights and Measures. Held at Berlin. Fourteen powers attended. An international central bureau established at Berlin under charge of a permanent commission, meeting annually. Twenty-seven powers now adhere to it.

1864. Conference of London as to Marine Signalling.

1864. Conference of Paris as to Marine Signalling.

1865. Monetary Conference of Paris, resulting, December 23, in the Latin Monetary Union, between four powers, lasting till 1886. Conference of Paris in 1885 of four powers substituted (November 6) another convention.

³ Calvo, *Droit Int.*, I, 89.

1865. Conference of Paris on Telegraphic Correspondence. Twenty powers were represented. A convention was agreed on, and afterwards ratified, constituting "L'Union telegraphique universelle." Similar conferences followed, in 1865 at Vienna, in 1871 at Berne, in 1875 at St. Petersburg, in 1879 at London, in 1882 at Paris, in 1883 at Berlin. A permanent bureau was set up at Berne in 1869, and is still maintained. It is in correspondence with forty bureaus of as many different states, and over twenty private corporations. It issues an official Gazette, *Le Journal Télégraphique*.

1866. Conference of Paris as to the Navigation of the Danube. Confirmed the work as to neutralization by the European commission (see art. 108 *et seq.* of the Final Act of the Congress of Vienna of 1815).

1867. Monetary Conference of Paris. Twenty-two powers represented. The five franc piece recommended as the monetary unit.

1867. Conference of London, between eight powers, to neutralize Luxembourg.

1868. Conference at Geneva, to extend the operation of the Geneva Convention of 1864 to naval warfare.

1868. Parliament of the Zollverein at Berlin, April 27 to May 23. All the associated states represented.

1868. The International Military Commission met at St. Petersburg to consider Rules of War. Nineteen powers represented. The "Declaration of St. Petersburg" adopted. Use of explosive bullets condemned.

1869. Conference of Paris on the Cretan Question, January and February.

1870. International Commission on the Metric System, first met at Paris. Thirty powers represented. At a subsequent meeting in 1875, a convention agreed to, May 20, setting up at Paris an International Bureau of Weights and Measures (*Le Bureau du Metre*) to be maintained by *pro rata* contributions from the contracting powers, and managed by a permanent international committee of one from each power, meeting annually.

1871. Conference of London to consider the questions arising out of the neutralization of the Black Sea by the treaty of Paris of 1856. Its neutralization abrogated by a convention signed March 13. Six powers represented.

1872. Conference of the International Telegraphic Commission at Rome. Convention signed January 14 by twenty-one powers.

1873. Monetary Conference at Copenhagen. Three powers represented. The Scandinavian Monetary Union formed May 27.

1874. Conference of Berne, September 15, on a Postal Union. Resulted in a convention forming one (October 9). Permanent international bureau maintained at Berne since 1875, which is in correspondence with about fifty postal administrations of different powers. Congresses of delegates from the powers adhering to the convention met quinquennially to perfect and improve the union, but in case of need special international conferences may be called with the consent of two-thirds of the powers adhering. That of 1891, at Vienna, acted on the subject of international telephony. An official journal published monthly in three languages, *L'Union Postale*.

1874. Conference of Brussels to establish Rules of War. Attended by most of the European powers. Called by Russia. Promulgated a project for a code of rules as having been "discussed" ("The Declaration of Brussels"), but they were neither adopted nor ratified.

1874. Monetary Conference of Paris between five powers.

1874. Conference of Paris as to Submarine Telegraph Cables. Convention signed, March 14, by twenty-eight powers.

1875. Congress of International Telegraphy, at St. Petersburg. International convention agreed on, December 21, between sixteen powers.

1876. Conférence Géographique Internationale of Brussels. Seven powers participated. Created the "Association internationale Africaine."

1876-1877. Conference of Constantinople on the Eastern Question. Nothing accomplished.

1876-1877. Monetary Conference at Paris between five powers.

1877. Congress of Lima on Uniform Rules of Private International Law; called on the initiative of Peru. Met Dec. 9. Nine powers participated. Extradition treaty drafted.

1878. Conference at Berne to provide against the Phylloxera. Convention signed by seven powers, September 17, *ad referendum*, setting up a permanent bureau at Berne. Five ratified it.

1878. Conference of Berlin on the Eastern Question. Treaty signed by seven powers, making Roumania and Servia kingdoms.

1878. Le Congrès International de la Propriété Industrielle. Met at Paris, and again, by adjournment, in 1880. Reconvened in 1883, when ten powers were represented, and formed an International Union for the Protection of Industrial Property, with a permanent bureau at Berne. A convention for this purpose was confirmed at Berne in 1886, and ratified by many of the powers, going into effect in 1887.

1878. Monetary Diplomatic Conference at Paris, held on the initiative of the United States. Twelve powers represented. It set up a permanent international bureau in Berne.

1879. Conference of London as to International Telegraphy. Convention signed by nineteen powers, July 28.

1881. Conference of Berne to regulate railroad transportation. Convention agreed on at a later conference at Berne in 1890, and ratified by ten powers. Central bureau at Berne. Publishes a "Zeitschrift für den internationalen Eisenbahntransport."

1881. Monetary Diplomatic Conference at Paris, held on the initiative of France and the United States. Fifteen powers represented. Adjourned July 8 to April 12, 1882. The powers agreed not to reconvene it.

1882. Conference of Paris as to the neutralization of submarine telegraph cables. Convention agreed to, *ad referendum*, but not ratified.

1882. Conference at The Hague as to the Police of the North Sea fisheries. Six powers represented. International Fisheries Convention agreed to, May 6.

1883. Conference of London (February 2 to March 10) on the Navigation of the Danube. Convention agreed to, March 10, approving rules established by the permanent European Commission on the Danube.

1883. Conference of Brussels as to the Exchange of Official and Scientific Documents. Met again in 1886 and framed a convention, establishing a bureau of international exchanges, which eleven powers have ratified.

1884. Conference of Paris for the Protection of Submarine Telegraph Cables. Twenty-five powers represented. A convention was agreed to March 14, but reserved all rights of belligerents. Since ratified by twenty-eight powers. Went into effect May 1, 1888.

1884. Conference of Washington on a Prime Meridian. Adopted that of Greenwich.

1884-1885. The Conference of Berlin, November 15 to February 26, as to West African Affairs. Fourteen powers represented. A permanent international convention established to secure the free navigation of the Congo river. Conferences have been held since, in 1889 and 1890, at Brussels.

1885. International Congress of Commercial Law (otherwise styled Le Congrès International de Droit International) of Antwerp, September 27, called by Belgium. Considered the subjects of railroad transportation, international exchange, and a maritime code. Was adjourned first to September, 1887, and then to Brussels in September, 1888, to complete its work. Agreed on a draft code at Brussels in 1888.

1885. Conference of Paris as to the Freedom of Trade through the Suez Canal. Eight powers represented. A permanent international commission has been established with its seat at Paris.

1886. Conference of Brussels as to Exchanges of Official Documents. Convention for the purpose agreed on in May. The Argentine Republic adhered in 1902.*

1886. Conference of Berne, between ten powers, on Literary and Artistic Property. It constituted a "Union internationale pour la protection des œuvres littéraires et artistiques," with a permanent international bureau at Berne, consolidated in 1892 with that for the protection of industrial property. Hungary acceded to the union in 1906. Publishes a monthly journal, *Le Droit d'Auteur*.

1887. Conference of London as to abolition of Sugar Duties. Convention signed in 1888.

1887. Conference as to the Liquor Traffic on the North Sea. Convention adopted November 16, 1887.

1888. Congress of Constantinople to regulate the use of the Suez Canal. Thirteen powers represented. Treaty concluded, in October, between six powers.

1888. Congress of Paris as to Sugar Bounties, April, May, and August.⁵

1888-1889. Congress Sud-Americano de Derecho Internacional Privado, at Montevideo. Seven powers represented. Eight draft treaties adopted. Spain in 1893 adhered *ad referendum*.⁶

1888-1890. Union internationale pour le Publication des Tarifs Douaniers; formed at Brussels. Most of the civilized powers adhere. A permanent bureau at Brussels publishes bulletins in five languages.

1889. Conference of three powers, at Berlin, on Samoan Islands. Convention for their neutralization and police agreed on.

1889. Conference of St. Petersburg as to International Telegraphy.

1889. Conference of London on Sugar Duties. Eight powers represented. Nothing accomplished.

1889. Conference of Berne, in September, to promote the well-being of the Working Classes.

1889. International Marine Congress as to Uniform Rules to Secure Life and Property at Sea, or "International Maritime Congress," held at Washington, on the call of the United States, October 16 to December 21. Twenty-seven nations represented. Considered co-operative plans

* *Annuaire de Legislation Etrangere*, XXXII, 749.

⁵ Reference to several of the prior congresses on this subject, held in 1872, 1873, 1875, 1876, 1877, and 1887, has not been made, as they were fruitless. See the *Archives Diplomatiques*, 3d series, 1901, II, 169.

⁶ Torres Campos, "Elementos de Derecho Internacional," 3d ed. 141.

for destroying floating derelicts and for preventing collisions. Rules adopted which went into effect July 1, 1897. Pronounced against a permanent international maritime commission.

1889-1890. Conference for the Suppression of the Slave Trade. Held at Brussels, November 18 to July 2, on call of Belgium. International bureau set up at Brussels in 1890. General Act adopted July 2, 1890, by seventeen powers, *ad referendum*.

1890. Conference of Brussels formed L'Union pour le Publication des Tarifs Douaniers. Has a permanent seat at Berne. Publishes a bulletin.

1890. Conference at Berlin, March 15 to 29, called on the initiative of Germany, for the Protection of Labor in Factories and Mines. Fourteen powers represented. A protocol agreed on recommending legislation.

1890. Conference at Brussels to regulate affairs in the Congo State. Prohibitory rules as to sale of spirituous liquors established, and since ratified by seventeen powers.

1890. First Pan-American Conference at Washington, October 2, 1889, to April 19, 1890. Adopted international arbitration as a principle of American international law. Draft treaty to that effect signed, *ad referendum*, by eleven powers, but never ratified by any. Established the International Bureau of the American Republics at Washington. Publishes a bulletin.

1890. Conference at Berne as to Railroad Transportation. Nine powers represented. Convention agreed to, October 14, establishing a permanent bureau at Berne, publishing a monthly journal. Went into effect January 1, 1893.

1890. Conference at Stockholm as to Fisheries in the North Sea. Second meeting at Christiania in 1901. Central council established at Copenhagen. Nine powers represented.

1892. Monetary Congress of Brussels on the initiative of the United States. Nothing accomplished.

1892. Le Congrès International de Droit Maritime of Genoa.

1893. International Sanitary Conference at Dresden, March 11 to April 15, for the Repression of Epidemic Diseases. Twenty powers represented. Convention signed, *ad referendum*.

1893. Monetary Conference of the five powers of the Latin Union at Paris, October 15 to November 15.

1893. First Conference of The Hague on Private International Law. Thirteen European powers represented. Four conventions agreed on.

1894. Second Conference of The Hague on Private International Law. Fifteen powers represented.

1894. International Sanitary Conference at Paris, February 7 to April 3. Sixteen powers attended. Regulations adopted to prevent spread of cholera, with special reference to pilgrimages to Mecca. Portugal adhered to them in 1898.

1894. Conference of Berne, September 25 to October 3, as to the Publication of Treaties by a governmental union created for that purpose. Eighteen powers represented. Fourteen others expressed sympathy. Nothing accomplished.

1895. Monetary Conference of Paris.

1896. The International Maritime Committee formed. Fifth meeting at Hamburg in 1902.

1896. Conference of Paris on the Protection of Artistic and Literary Property. Most of the powers attended. Convention of Berne revised.

1897. Conference of Paris as to Ocean Telegraphy.

1897. Sanitary Conference at Venice, February 16 to March 19, to take measures against the Plague. Convention adopted March 19. Signed by seventeen powers. Switzerland adhered in 1898.

1898. Conference on Sugar Taxes at Brussels, June 7 to 25. Nine powers represented. Adjourned to December 16, 1901, and again to January 20, 1902. Convention signed.

1899. Conference at Brussels to regulate Liquor Traffic in Africa. Most of the leading powers in the world attended. Adopted, June 8, a measure of repression by heavy taxes, which was generally ratified.

1899. Conference of Peace at The Hague, May 18 to July 29. Twenty-seven powers represented. Three conventions adopted and The Hague Tribunal instituted. A permanent "International Bureau" established at The Hague (Art. XXII), under the direction of a permanent "Administrative Council" (Art. XXVIII).

1900. Third Conference of The Hague on Private International Law.

1900. Conference of St. Petersburg as to International Telephony.

1900. Conference of Brussels as to Abolition of Sugar Duties.

1900. Social and Economic Spanish-American Congress of Madrid in November. Sixteen powers represented, including Portugal. Resolutions looking to close economic and social relations between them adopted. A permanent executive commission created.

1901-1902. Conference of Mexico of eight powers, October — to January 29. Convention agreed to, *ad referendum*, to submit all diffi-

culties that may arise between them to The Hague tribunal, or to a special arbitration commission, if either party prefer. Uruguay ratified in October, 1902.⁷

1902. General Sanitary and International Conference of the American Republics, organized at Washington, December 2-4.

1902. International Conference at Paris to repress the White Slave Trade (*la Traite des Blanches*). Fifteen powers represented.

1902. International Conference at Brussels as to the Regulation and Production of Sugar. A convention adopted, and a standing International Sugar Commission created, meeting semi-annually. Permanent bureau at Brussels.

1902. Central American Peace Congress at Corinto. Four powers attended. A convention to promote peace between the Central American republics, signed by all. Convention adopted January 20 establishing the Central American Tribunal of Arbitration, since ratified by all. Tribunal met at San Salvador in February, 1907.

1902. Conference internationale pour l'unification de la formule des Médicaments héroïques, held at Brussels, September 15-20. Nineteen powers represented.

1903. Conference of Berlin on Wireless Telegraphy, August 4-13. Eight powers represented. Convention signed by seven powers.

1903. International Sanitary Convention of Paris. Convention signed December 3.

1904. Fourth Conference at The Hague on Private International Law, May 16 to June 7. Fifteen powers represented. Four new conventions proposed. An official bulletin published since 1906 descriptive of the work of these conferences.

1904. Congress of Zurich, in May, to repress the White Slave Trade (*Congrès International de la Traite des Blanches*). Fifteen powers represented. Treaty adopted and ratified by twelve powers (Brazil one), which went into effect July 18, 1905. Third Conference held in Paris on October 22-24, 1906.

1905. International Congress of Agriculture at Rome (May 28). Forty-one powers represented. Agreed to a convention for the formation of an International Institute of Agriculture, with seat at Rome. A number of powers in Europe and America have since ratified it.

1905. Second General International Sanitary Convention of the American Republics at Washington, October 9-14. Thirteen powers represented.

⁷ *Annuaire de Legislation Etrangere*, XXXII, 744.

1905. International Diplomatic Conference on Maritime Law, held at Brussels, February 21-25 and September-October. Thirteen powers represented. Projects of conventions on "*abordage et sauvetage*" adopted.

1905. International Diplomatic Conference regarding Labor Protection, held in Berne, May 8-17. Attended by the principal European powers, excepting Russia. Recommended factory regulation by the prohibition of the use of white phosphorus in matches and of night work for women. A second Conference at Berne, September 17-26, 1906, agreed on conventions to this effect. Seven powers signed that as to phosphorus, and fourteen that as to women, *ad referendum*.

1906. Conference at Geneva, June 11 to July 6, to revise the Convention of 1864 as to Humanity in War. Thirty-five powers represented. Convention agreed to, July 6, by all, *ad referendum*.

1906. Conference of Brussels on the Liquor Traffic in Africa. Convention agreed to by eleven powers.

1906. Algceiras Conference. Thirteen powers represented. An international Moroccan police established.

1906. Third Pan-American Congress. Met at Rio de Janeiro July 23 to August 27. Recommended the establishment of two bureaus for the protection of industrial property, one at Rio de Janeiro and one at Havana, and the consideration of the "Drago" doctrine at The Hague Conference of 1907.

1906. Conference de Paz Centro-Americano at San José, September 15-25. Four powers represented. Agreed to convention establishing a Central American bureau in Guatemala and a Central American Pedagogical Institute in Costa Rica, which two powers have since ratified; also to a general treaty of alliance and commerce, since ratified by one.

1906. Conference of Berlin on International Wireless Telegraphy (*zur Regelung der Funkentelegraphie*), October 3 to November 3. Twenty-six powers represented. Convention signed. Disputes to be the subject of arbitration. International bureau established.

1906. Conference at Brussels as to Unifying Formulas of Potent Drugs. Twenty powers represented. All signed a convention to that end November 29.

1907. Second Conference of Peace at The Hague on June 15.

List of the more important international congresses, conferences or associations of the past century, composed of private individuals.*

* In preparing this list I have been much aided by the information contained in *Les Belges et la Paix* by Louis Frank, *Silver in Europe*, by S. Dana Horton, and the card catalogue of the Astor Library, New York. So far as I know no

AGRICULTURE AND BOTANY

Le Congrès International de l'Alimentation Nationale du Bétail. Held at Antwerp in 1894. Met again at Paris, June, 1906.

Le Congrès International Agricole. Held at Paris in 1906.

Le Congrès International d'Arboriculture. Held at Paris in 1900.

International Cotton Congress. Held at Vienna May 27, 1907.

International Congress on Plant Breeding. Third meeting held at London, July 30, 1906.

International Congress of Horticulture and Botany. Held at Brussels in 1864. Twelfth (quinquennial) meeting at Vienna in 1905.

International Conference at Lausaune in 1877 for the Extermination of the Phylloxera. Led to the diplomatic conference of Berne in 1878.

International Congress of Pomology, at Namur, in 1862.

THE AIR

La Fédération Aéronautique Internationale. Organized at Berlin, October 15, 1906. Next meeting at Brussels, September, 1907.

International Congress of the Atmosphere. Held at Antwerp in 1894.

AMERICA

International Congress of Americanists. Organized at Nancy in 1875. Fifteenth meeting held at Quebec in 1906.

Congress científico latino americano. Met at Buenos Ayres in 1898, Montevideo in 1901, Rio de Janeiro, August 5-17, 1903.

Latin American Medical Congress. Third (bi-ennial) meeting at Montevideo, March 18, 1907.

COMMERCE

International Congress of Chambers of Commerce. Met at Milan, September 24, 1906.

International Congress of Commerce and Industry, organized in Brussels in 1880. Last meeting at Ostend in 1902.

International Maritime Congress, held at Naples in 1871.

International Congress on General Average. Held at Glasgow in 1860, London in 1862, and York in 1864. The "York rules" adopted at the last.

general list either of public or private congresses has ever been hitherto prepared. Both those now published may be expected to have the imperfections incident to statistical work in a new field.

International Congress of Railroads; first met at Brussels, August 8-15, 1885. Seventh meeting at Washington in 1905. Publishes a monthly bulletin in two languages.

L'Union internationale des Tramways et des Chemins de Fer d'intérêt local. Organized at Brussels in 1885. Thirteenth meeting at Vienna in 1904.

CORPORATIONS

Le Congrès International des Sociétés par Actions. Met at Paris in 1889, June 12-19.

CRIMES AND PRISONS

Le Congrès Pénitentiaire Internationale, organized in 1846 as Le Congrès Pénitentiaire, at Frankfort on the Main. Has a permanent bureau at Berne. About thirty powers now send official delegates to its meetings, but it has no functions of a diplomatic nature. Tenth (quinquennial) meeting at Budapest in 1905.

International Congress for the Study of Questions relative to the Patronage of Convicts and Protection of Children Morally Abandoned.

International Congress of Criminal Anthropology. Meets stately.

The International Union of Criminal Law. Formed at Brussels in 1889. Tenth meeting at Hamburg in 1905.

EDUCATION

International Congress of Commercial Education. Held at Antwerp in 1898.

International Congress of Instruction. Held at Brussels in 1880.

International Association for the Advancement of Sciences, Arts, and Education. Second meeting held at Glasgow, 1901.

International Congress of Students. Held at Liège in 1865.

International Educational Conference of Paris. Held in 1884.

International Congress of Education and the Protection of Childhood in the Family. Held at Liège, 1905.

ELECTRICITY AND ITS APPLICATIONS

International Electrical Congress (Société Internationale des Electriciens). Met in Paris in 1881; at St. Louis, 1904.

FISHERIES

International Congress of Sea Fisheries. Met at Dieppe in 1898.

GEOGRAPHY

International Congress of Geography. Held at Antwerp in 1871. Eighth meeting at Washington in 1904.

International Geological Congress. Tenth meeting at Mexico, September 6-14, 1906.

International Geodetic Association. Organized at Berlin in 1864. Fifteenth (triennial) meeting held at Budapest, September 20-28, 1906. Central bureau. International convention agreed to in 1895 to run ten years.

International Congress for the Study of the Polar Regions. Met at Brussels in 1906 (September 10). Instituted a permanent international commission for the purpose.

The International Council for the Exploration of the Sea. Met at Amsterdam, February 27, 1906.

THE INDUSTRIAL ARTS.

International Congress to Study the Industrial Uses of Alcohol, held at Paris, 1903.

International Association for the Protection of Industrial Property. Ninth Congress at Milan, September 14-16, 1906.

International Congress of Contractors. Held at Liège in 1881.

International Patent Congress of Vienna in 1873.

International Association for Testing Materials. Last (triennial) meeting at Brussels, September 3, 1906.

INTOXICATING LIQUORS

International Congress for the Study of Questions relative to Alcoholism. Held at Brussels in 1880.

International Congress against the Abuse of Alcoholic Drinks. Organized at Antwerp in 1885. Tenth meeting at Budapest in 1905.

International Congress on Breweries. Held at Brussels in 1880.

International League against Alcoholism.

LABOR

International Congress of Employees. Held at Brussels in 1903. Third meeting at London (April 14), 1906.

International Congress of Working Glovers. Held at Brussels in 1892.

International Association for Labor Legislation. Founded at Paris in 1900. Has a permanent bureau in Basel since 1901. Issues a monthly bulletin. Is aided by most governments by annual grants. Fourth meeting September 27-29, 1906, at Geneva.

Le Congrès International de Législation du Travail. Held at Brussels in 1897. Publishes a year-book.

International Congress of Textile Workmen. Held at Ghent in 1895. Permanent bureau set up.

International Congress on the Unemployed. Met at Milan, September 28-29, 1906.

International Workingmen's Association. Founded in 1864 at London. Dissolved in 1872 at The Hague.

Miners' International Congress. Seventeenth meeting at London, June 5, 1906.

Le Congrès International des Accidents du Travail et des Assurances Sociales, held in Paris in 1889. Last meeting at Vienna, 1905.

Le Congrès International de Travailleurs de Voies Ferrées. Held at Amsterdam, 1904.

LANGUAGES

International Celtic Conference. Held at St. Briene in 1867.

International Esperanto Congress. First meeting at Boulogne in 1905.

International Oriental Congress. Has stated meetings.

LAW

Le Congrès International des Avocats. Met at Brussels in 1897; second meeting at Liège in 1905.

L'Association Internationale des Avocats. First met at Liège, 1905.

L'Institut de Droit International. Founded in 1873. Meeting at Ghent, September 1, 1907. Meets next at Florence in 1908.

International Law Association. Twenty-third Conference to be at Portland, August 29, 1907. The "York rules" revised at its Antwerp meeting in 1877, and now generally used in commerce by the name of the "York-Antwerp Rules."

International Congress on the Study of the Transfer of Real Estate. Held at Paris, August 8-14, 1889.

International Conference on the Codification of Maritime Law. Second meeting held at Paris, October 16, 1905.

International Congress of Maritime and Commercial Law. Held at Antwerp in 1885. Last meeting at Paris in 1889.

International Congress of Maritime Law. Met at Geneva, September 26 to October 5, 1892.

International Maritime Committee (for the Unification of Maritime Law). Constituted at Brussels in 1894. Seventh meeting at Liverpool in 1905.

International Congress on Private International Law. Held at Paris in 1900. Created a standing commission to organize an Institute of Publication of Laws and Decisions.

The International Congress of Comparative Legislation. Held at Paris in 1900.

Congress of Jurisconsults at Lima in 1878.

The Juridical Congress of Lisbon. Held in 1888.

Universal Congress of Jurists and Lawyers. Met at St. Louis in 1904.

LITERATURE AND THE FINE ARTS

L'Association Littéraire et Artistique Internationale. Eighteenth meeting at Bucharest in 1906.

Le Congrès International de l'Art Public. Organized at Brussels in 1898. Third meeting at Liège, September 15, 1905.

International Congress concerning Literary and Artistic Property. Met at Brussels in 1858. United in 1889 with l'Association Littéraire et Artistique Internationale. Bureau set up at Berne in 1886.

International Congress for Exchanges of Artistic Reproduction. Held at Brussels in 1885.

International Bibliographic Conference. Held at Brussels in 1895. Permanent bureau there. Publishes a bulletin and a year-book.

International Convention of the International Catalogue of Scientific Literature. Second (quinquennial) meeting at London, July 25, 1905. Has thirty-two affiliated "regional bureaus" in as many countries.

Das internationale Institut für Sozial-Bibliographie. Organized at Berlin in August, 1905.

International Congress of Librarians. Met at Paris, March 8, 1903.

International Literary Congress. Founded in 1878. Twenty-seventh meeting at Liège in 1905.

MEDICINE, SURGERY, AND PHYSIOLOGY

International Congress of Dentistry. Held at Paris in 1889, September 1-7.

International Dermatological Congress. Sixth meeting at Paris in 1905.

International Congress of Gynæcology and Obstetrics. Held at Brussels in 1892. Fifth meeting at St. Petersburg in 1905.

International Congress on the Care of the Insane. Has met at Antwerp and Milan.

International Congress of Medicine. Fifteenth meeting held in Lisbon (April 19), 1906; next to be at Budapest in 1909.

International Association of Medical Examiners for Insurance Companies. Formed at Brussels in 1901. Fourth meeting at Berlin in 1906. Publishes a bulletin.

International Congress of Ophthalmology. Organized at Brussels in 1857. Tenth meeting at Lucerne, 1904.

International Congress of Physiology. Seventh triennial meeting at Heidelberg, August 13, 1907.

International Congress for Psychiatry, Neurology, Psychology, and the Care of the Insane. First meeting to be at Amsterdam, September 2-7, 1907.

La Société Internationale de Prophylaxie Sanitaire et Morale. Organized at Brussels in 1902.

International Congress for the Prevention of Tuberculosis. Met at The Hague in 1906. (September 6).

The American International Congress on Tuberculosis. Organized in New York in 1900. Met there November 14-16, 1906. To meet at Washington in 1908.

International Sanitary Convention. Organized at Paris in 1851. Twelfth meeting at Washington in October, 1905.

International Surgical Congress. Second meeting at Brussels, September, 1908.

MONEY

Der Internationale Doppel-Währungs Verein. Founded in 1881.

International Congress on Bimetallism. Met at Paris in 1889. Ten powers sent official delegates, but the large majority of those attending were private individuals.

NAVIGATION

International Congress of Navigation. Met at Düsseldorf in 1902.

International Congress of Internal Navigation. Held at Brussels in 1885. Tenth meeting at Milan in 1905.

International Congress to Fix Rules for Rating Yachts. Met at London in 1906.

PEACE AND ARBITRATION

International Arbitration League. Established in 1870 at London as the "Workman's Peace Association." Permanent bureau at London.

L'Association Internationale d'Arbitrage et de Paix.

Le Congrès de l'Alliance Universelle de l'Ordre et de la Civilisation. Met at Paris in 1872, and established a standing commission to promote international arbitration.

The Nobel Institute. Instituted in 1904 under will of Alfred Nobel.

L'Institut international de la Paix at Monaco. Founded in 1903 by the Prince of Monaco.

International Peace Congress, held at London in 1843.

Universal Peace Congress. Organized in Brussels, September 20-22, 1848, as the "Congrès des Amis de la Paix." Fifteenth meeting at Milan, September 15-22, 1906. Central bureau at Berne since 1891.

PHILANTHROPY

International Congress of Public Charities. Held at Paris, July 28 to August 4, 1889.

International Congress of Public Assistance and Beneficence. Organized at Brussels in 1856. Seventh meeting at Paris in 1900.

International Congress for the Amelioration of the Lot of the Blind. Held at Brussels in 1902.

La Société Internationale de Prophylaxie Sanitaire et Morale. Organized at Brussels in 1902.

International Congress for Aid to Injured Cyclists. Held at Brussels in 1895.

International Congress for the Protection and Welfare of Children. Fourth meeting held at Berlin, May 22, 1907.

International Congress for the Assistance of the Insane. Held at Antwerp in 1902.

International Congress of Hygiene and Demography. Fourteenth meeting at Berlin September 23-29, 1907.

International Congress for the Promotion of Hygiene and Salubrity in Dwellings. Second meeting held at Geneva, September 4, 1906.

Le Congrès Scientifique International des Institutions de Prévoyance. Founded at Paris in 1878.

International Reform Bureau. Has a permanent bureau at Washington.

International Conference of Paris on Works of Assistance in Time of War, 1900.

International Conference at Geneva in 1863, to provide for the better care of the wounded in battle. Led to the Diplomatic Conference of Geneva in 1864, and to the International Conference of the National Societies of the Red Cross. Has established a permanent International Red Cross Committee at Geneva. Eighth meeting of Conference at London in June, 1907.

POLICE

International Congress of Firemen. Held at Liège in 1901. Tenth meeting at Milan in 1906.

International Congress for the Protection of Works of Art and Monuments. Held at Paris, June 24-29, 1889.

POLITICAL OR RACIAL

The Frankfort "Preliminary Convention" of March 31-April 4, 1848, which practically forced the Federal Diet to adopt a policy of Nationalism.

The National Assembly of Germans, opened at Frankfort, May 16, 1848.

The Pan-Slavic Congress of Prague in 1848. Held to promote a Slavic political union.

The National Union (Kleindeutsch) of 1859.

The Reform Union (Grossdeutschen) of 1862.

Spanish-American Juridical Congress of Madrid. Held in November, 1892.

L'Institut Colonial International. Founded at Brussels in 1894. Ninth meeting at Rome in 1905. Has a permanent bureau at Brussels.

THE PRESS

International Congress of Editors. Fifth meeting at Milan (June 5), 1906.

International Congress of the Press. Met at Antwerp in 1894. Tenth meeting at Liège in 1905.

RELIGION

International Chaplains' Association. Organized at Budapest in September, 1906.

International Congress of Free Thinkers. Organized at Brussels in 1880. Last meeting at Rome in 1904.

World's Christian Student Federation. Seventh (biennial) meeting at Tokio, April 13, 1907.

World's Parliament of Religions. Held at Chicago in 1893.

International Congress of Religious Liberals. Fourth meeting to be held at Boston, September 22-27, 1907. About fifty religious associations are affiliated with it, including three from India.

The alliance of the Reformed Churches, holding the Presbyterian System (otherwise known as the Pan-Presbyterian Council). Organized at London in 1875. Meets quinquennially.

World's Christian Student Federation Conference. Met at Tokio, April, 1897.

The Ecumenical Methodist Conference. First meeting at New York, 1892. Meets decennially.

The Lambeth Conference of Bishops of the Anglican Communion. First held in 1867, at Lambeth.

The Vatican Council. 1869, 1870.

The World's Council of Congregationalists. Second meeting at Boston in 1899. Next in Edinburgh, June 30, 1908.

Evangelical Alliance. Founded in London in 1846. Established "The International Conference of Evangelical Alliances," which holds its eleventh meeting in London, July 3, 1907.

SCIENCE

International Association of Academies. Established in 1899, on initiative of Royal Society of London. Has a permanent central bureau. Third (triennial) meeting in Vienna, in 1907. Organized into several commissions.

International Congress of Actuaries. Met at Brussels in 1895. Fourth meeting at New York in 1903. Permanent bureau at Brussels. Publishes a bulletin.

International Congress of Anthropology and Prehistoric Archæology. Next (annual) meeting at Strasburg, August 4-8, 1907.

International Archæological Congress. Next meeting at Alexandria, April, 1909.

The Congress of Arts and Sciences at St. Louis in 1904. Eight volumes of proceedings published.

International Congress of Applied Chemistry. Sixth meeting at Rome, May 5, 1906.

International Congress of Chronometry. Held in Paris, 1900.

International Economic Congress. Met at London, January 10, 1907.

International Engineering Congress. Held at Chicago, 1893.

International Ethical Conference. Met at Eisenach, July 4, 1906. Has organized an International Union of Ethical Societies.

International Federation of Free Thought. Permanent bureau set up at Rome in 1904.

International Historical Congress (Internationaler Kongress für historische Wissenschaften). Next meeting at Berlin, August 6-12, 1908.

International Congress of Hygiene and Demography. Organized at Brussels in 1876. Fourteenth meeting at Berlin, September 23, 1907.

International Congress of Mathematicians. Fourth meeting at Rome, April 6, 1908.

International Meteorological Conference. Third meeting held at Innsbruck in September, 1905.

International Congress of Philosophy. Met at Geneva in 1904; at Paris in 1906.

International Congress of Photography. Met at Paris in 1889, August 6-17.

International Society of Physicists. Met at Paris, 1900.

International Congress of Psychology. Fifth meeting at Rome in 1905.

International Congress of Radiology. First meeting at Liège in 1905.

International Scientific Congress. Organized at Paris in 1879.

International Seismological Association. Has a permanent bureau at Strasburg.

International Union for Co-operation in Solar Research. Met at Meudon in 1907. Central bureau at University of Manchester; computing bureau at that of Oxford.

International Statistical Institute. Established in 1885, at London. Tenth meeting held in 1905.

SOCIALISM

International Congress of Co-operative Socialist Societies. Held at Brussels in 1901.

Le Congrès International Ouvrier Socialiste. Organized at Brussels in 1891. Permanent bureau there since 1900.

International Socialist Congress. Met at Brussels June 9, 1907.

SOCIOLOGY AND SOCIAL SCIENCE

International Co-operative Alliance. Organized at London in 1895, to promote international co-operation with permanent bureau there. Sixth meeting at Budapest in 1904.

International Association for the Progress of the Social Sciences. Formed at Glasgow in 1860. Met in 1862, at Brussels; in 1864, at Amsterdam.

International Conference of Paris for the Teaching of the Social Sciences, in 1900. Created "La Commission permanente internationale de l'Enseignement Social," with a permanent seat at Paris.

L'Institut international de Sociologie. Founded at Paris in 1893.

WOMEN

La Federation Feministe Internationale. Has an "international council."

Le Congrès International Feminin. Organized at Paris in 1878. Met there again in 1889.

International Convention of Women. First meeting held at Washington in 1888.

International Woman Suffrage Alliance. Issues a monthly bulletin styled the *Jus Suffragii*, from Rotterdam.

WORLD POLITICS AND ECONOMICS

International Eastern Question Association. Met at London, February 3, 1906.

The Interparliamentary Union. Organized in 1889, at Paris. 2,000 members (1907). Fourteenth Conference at London, July 23, 1906. Permanent bureau since 1892, at Berne.

International Congress of Economic Expansion. Held at Mons in 1905.

International Association of Fairs and Expositions. Met at St. Louis in 1884.

ZOOLOGY

International Zoological Congress. At sixth meeting, in 1904, adopted an international code of zoological nomenclature. Meets at Boston in August, 1907.

International Congress of Ornithology. Held at Paris in 1900.

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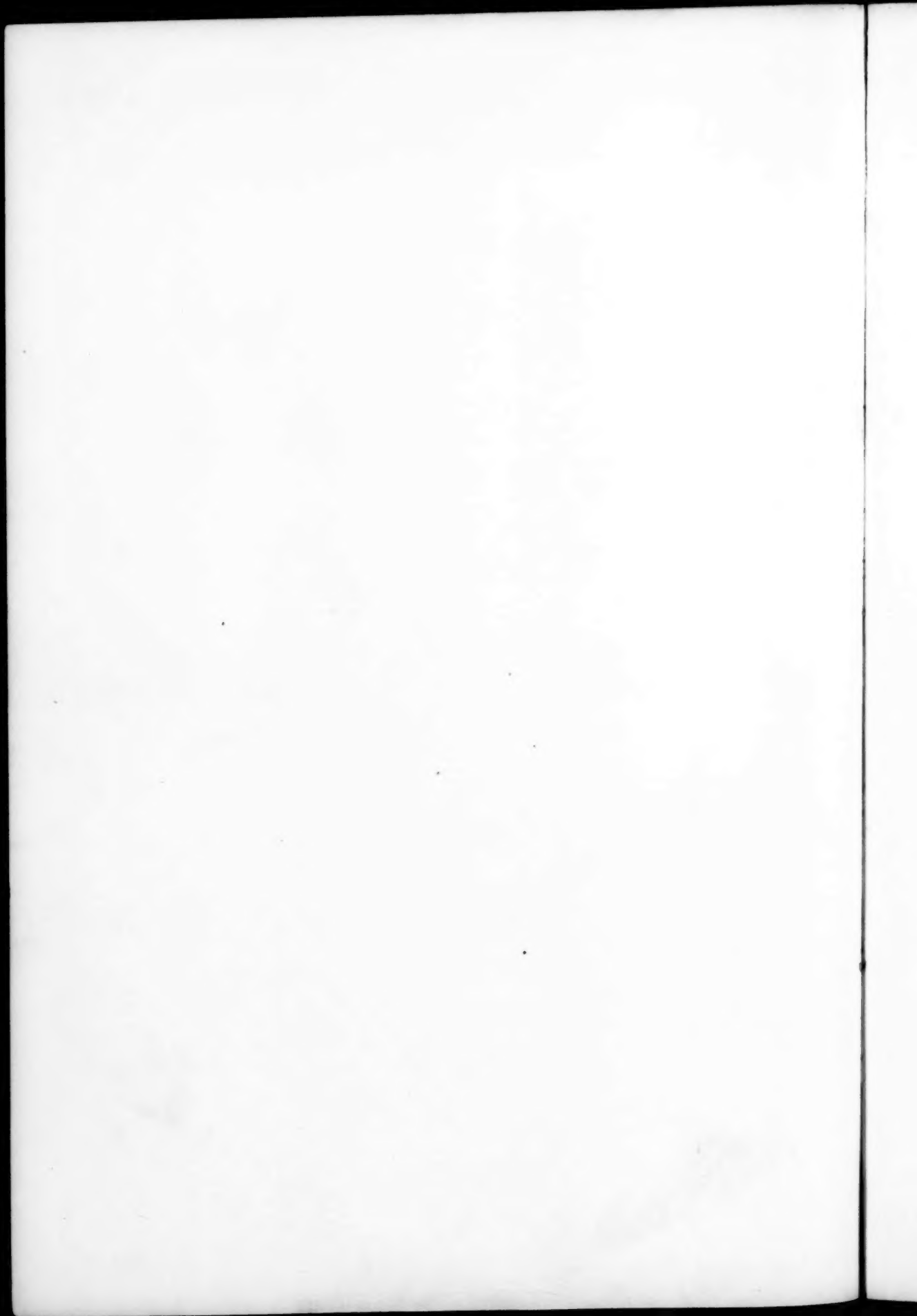
SUPPLEMENT — IMPORTANT TEXTS OF AN INTERNATIONAL CHARACTER.

THE AMERICAN JOURNAL OF INTERNATIONAL LAW is supplied to all members of the American Society of International Law without extra charge, as the membership fee of five dollars per annum includes the right to all issues of the JOURNAL published during the year for which the dues are paid.

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THE LEGAL NATURE OF INTERNATIONAL LAW¹

International law — to use Bentham's innovation of 1789, which has found favor with the public, instead of the older, more expressive term, law of nations—has been variously denounced and praised as international morality or ethics; international courtesy or convention in the social sense of the word; comity as distinguished from rule of law; or merely and finally as the foreign policy, such as the Monroe Doctrine, which at a particular time happens to catch the fancy of nations. If admitted as law in general or as possessing some of the elements of ordinary municipal law, the principle that pinches is declared not to be law and to have no binding force whatever, because there is no supreme court of nations in which the dispute may be litigated and no sheriff to execute the decree, supposing that one had actually been delivered. But the judgment of a municipal court is not self-executing, as, for instance, when President Jackson stamped his foot, saying: "John Marshall has made the decision; now let him execute it!" The executive officer of the court, the sheriff or marshal, did not enforce it, and that, forsooth, changed the nature of the transaction! Suppose the sheriff meets resistance in performing the mandate of the court, the armed force of the nation may be called upon and in final result the nation is in the field. Now, suppose a nation declares that a principle of international law has been violated and the demand for reparation is refused, war ensues, and the field marshal is no less a person than the sheriff. It is submitted that the mere form of the sanction is immaterial, and that the nature of law cannot well depend upon the whim or ability of a sheriff, or the mere success or failure of an army in the field. If the principle is binding at all—that is, if nations admit that a principle binds them—it is of no great moment whether the force is moral, ethical, or physical. It does not make much difference in the end to the criminal, nor to the rest of mankind, whether the offender has his neck broken or is electrocuted, provided

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death results. It seems, therefore, unscientific, if not positively absurd, to make the essence of a thing depend upon a mere form of punishment.

But the question is after all a quibble of words—a mere *wortstreit*, as the Germans aptly phrase it—for if modern civilized nations agree to regard a body of rules and regulations as binding them in their mutual dealings and punish infractions of this code by embargo, reprisals, retortions, pacific blockades, and war, it would seem that the sanction—that is, the penalty predicated upon the element of force demanded—is present. The difference of origin and form is merged in the result. For instance, an act of Congress is the joint product of House of Representatives, Senate, and President (supposing he approves it, or it becomes a law over his veto or without his action); a treaty is the act of the President and two-thirds of the Senators present. There is indeed a difference in the origin and the stages through which law and treaty pass; but the Constitution ascribes to the treaty the force of law, saying in effect that the treaty so acted upon is law, the law of the land, in precisely the same sense that an act of Congress is law.²

If, therefore, nations regard a principle as binding as a law which would seem not to be a law without this consent, express or implied, as evidenced by usage and custom, such principle certainly does have the force of law, although it may differ widely in its origin from the municipal law, just as a treaty differs in formation from an ordinary act of Congress.

The simple but forcible illustration of Abbé Galliani in maintaining a first cause as against the doctrine of chance is clearly in point. There is—to paraphrase rather than to quote him literally—nothing strange in a man's throwing double sixes once; if he throws them two or three times in succession, the transaction becomes a trifle suspicious; but if he throws double sixes every time, the inevitable conclusion in the mind of every reasonable and thinking person is that the dice are loaded. Now, if nations enforce a given tenet of international law as law every time it comes into play, it must surely be because it is law and binding, and if the accepted definition of municipal law does

² Article III, Sec. 2, *Foster & Elam v. Neilson* (1829) 2 Pet. 253, 314; *Wunderle v. Wunderle* (1893), 144 Ill. 40; *Whitney v. Robertson* (1887), 124 U. S. 190; *Geofroy v. Riggs* (1889), 133 U. S. 258. And see generally Butler's *Treaty-Making Power of the United States*.

not include this law of nations, everywhere existent in modern civilized life, enforceable and enforced as law, something must be the matter with the accepted conception of law.

The early English authorities accepted the law of nations as law in the concrete, and administered it in courts of justice and common law whenever a case arose in a court necessarily involving a question of international law. The statement of Sir William Blackstone may be taken as summing up the view of the bench and bar in his day. In a passage of his Commentaries (Book IV, chap. 5, p. 67), not so well known as it should be, the learned expounder of the laws of England says:

The law of nations (whenever any question arises which is properly the object of its jurisdiction) is here [England] adopted in its full extent by the common law, and is held to be a part of the law of the land.

But it is highly probable that the judges before whom these cases came contented themselves with administering the law as they found it, and that they troubled themselves but little if at all with the question whether the principle of law correctly applied in the concrete should be regarded as law in the abstract. It is doubtful whether such a question would have interested them, because there was very little English authority in existence and practically no discussion of moment or importance. Indeed Lord Talbot

argued and determined from * * * the authority of Grotius, Barbeyrac, Binkershoek, Wiquefort, etc.; there being no English writer of eminence upon the subject.³

The appearance of Bentham, however, and the rigorous examination to which he subjected law in the concrete, led to a careful examination of the underlying reason of the law in general and its essential elements.⁴ If the law, or principle of law, stood this searching and

³ Quoted from the opinion of Lord Mansfield in *Triquet v. Bath* (1764), 3 Burr. 1478, because Lord Mansfield says: "I was of counsel in this case [before Talbot] and have a full note of it."

⁴ "Bentham was the first English writer who viewed law as a whole or criticised English law as a system. He was the first to test English law by a logical standard." (F. C. Montague in the introduction to his admirable edition of Bentham's *Fragment on Government*, p. 20.) The *Fragment on Government*—a searching and withering examination of Blackstone's legal philosophy—appeared in 1776, and the *Introduction to Principles of Morals and Legislation* in 1789. This latter is perhaps his greatest work, and is at once the clearest exposition of the principle of utility and the most concise and readable statement of his chief principles. For a sympathetic

narrow analysis, for the element of historical growth was discarded or neglected, the law was admitted to his category of laws properly so-called. If it lacked one or more of these elements it was not law, at least not perfect law in his system. The law of nations, which he preferred to call international law, was submitted to this analytical test and was found wanting:

"The nature of the case," he says, "does not admit of any judicial methods, any regular procedure. * * * A treaty between two nations is an obligation which cannot possess the same force as a contract between two individuals. The customs which constitute what is called the *law of nations*, can only be called laws by extending the meaning of the term, and by metaphor. These are laws, the organization of which is still more defective and incomplete than that of political law."⁵

While this negation of the quality of law to international law is clear and explicit, it was reserved for John Austin⁶ to formulate the objection against the essentially legal nature of the law of nations in a more specific, scientific, and systematic manner. Great as the influence of Austin and his school has been and is upon legal thought in England and America, it cannot be said that master and pupil have fanned into flame "the gladsome light of jurisprudence." On the contrary, they have rather smothered it so far as international law is concerned.

"Society," says Mr Austin, "formed by the intercourse of independent political societies, is the province of international law, or of the law obtaining between nations. For (adopting a current expression) international law, or the law obtaining between nations, is conversant about the conduct of independent political societies considered as entire communities *circa negotia et causas gentium integrarum*. Speaking with greater precision, international law, or the law obtaining between nations regards the conduct of sovereigns considered as related to one another.

"And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author."⁷

and adequate account of Bentham, see Sir Leslie Stephen, *English Utilitarians*, vol. i, devoted entirely to Bentham and his philosophy.

⁵ View of a Complete Code of Laws, chap. iv, works (Bowring's edition, vol. iii, p. 162).

⁶ For a sketch of Austin, see Sir Leslie Stephen, *English Utilitarians* vol. iii, pp. 317-336.

⁷ Exception might well be taken to Austin's contention that law "is set by a given sovereign to a person or persons in a state of subjection to its author." This paper, however, is chiefly concerned with the question of sanction. See Salmond's *Jurisprudence*, Appendix II, pp. 628-639.

In his *Essays on Some Disputed Questions of International Law* (2d ed.),

As I have already intimated, the law obtaining between nations is law (improperly so-called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its general evils, in case they shall violate maxims generally received and respected.⁸

"But," says Mr. Austin in another passage, "a so-called law set by general opinion is closely analogous to a law in the proper signification of the term. And, by consequence, the so-called sanction with which the former is armed, and the so-called duty which the former imposes, are closely analogous to a sanction and a duty in the proper acceptation of the expressions."⁹

Again:

The so-called law of nations consists of opinions or sentiments current among nations generally. It, therefore, is not law properly so-called. But one supreme government may doubtless *command* another to forbear from a kind of conduct which the law of nations condemns. And, though it is fashioned upon law which is law improperly so-called, this command is a law in the proper signification of the term. Speaking precisely, the command is a rule of positive morality set by a determinate author. For as no supreme government is in a state of subjection to another, the government commanding does not command in its character of political superior. If the government receiving the command were in a state of

Mr. F. J. Lawrence discusses the matter in detail in the essay entitled, *Is there a True International Law?*

He shows that Austin only examined one element in the law, namely, force, to the exclusion of other necessary elements; that the idea of the sovereign "imposing law is true of but one stage in the development of law, the middle period, when the commands of a sovereign are obeyed because he has power to enforce obedience by coercive measures. It is not absolutely true of modern England. It is better suited to the kingdom of William the Conqueror than to the kingdom of Victoria. I do not assert that there is no element of force in our legal notions of to-day, but I deny that it is the chief element" (p. 20).

He quotes with approval (p. 13) the definition of the judicious Hooker, who says: "They who are thus accustomed to speak apply the name of law unto that only rule of working which superior authority imposeth; whereas we, somewhat more enlarging the sense thereof, term every kind of rule or canon, whereby actions are framed, a law."

See especially Sir Henry Maine's *Early History of Institutions*, chapters on Sovereignty, Sovereignty and Empire, pp. 342-400.

See also Westlake's *Principles of International Law*, pp. viii-ix.

⁸ The *Province of Jurisprudence Determined*, vol. i, pp. 231, 232. The edition referred to is the fourth published in 1873 under the editorship of Robert Campbell, and entitled *Lectures on Jurisprudence*. References to The *Lectures* as distinguished from The *Province*, are denoted *Lectures*, with the appropriate page.

⁹ The *Province*, etc., vol. i, p. 189.

subjection to the other, the command, though fashioned on the law of nations, would amount to a positive law.¹⁰

International law is thus, according to Austin, clearly a misnomer, as it is more ethical than legal in its nature.¹¹

It is and from the nature of things can be nothing more than positive morality.

Grotius, Puffendorf, and the other writers on the so-called law of nations * * * have confounded positive international morality, or the rules which actually obtain among civilized nations in their mutual intercourse, with their own vague conceptions of international morality as it *ought to be*, with that indeterminate something which they conceive it would be, if it conformed to that indeterminate something which they call the law of nature.¹²

Another and final quotation shows Mr. Austin's mature and digested view of the matter:

"Positive morality," he writes, as "considered without regard to its goodness or badness, *might* be the subject of a science closely analogous to jurisprudence. I say '*might be*': since it is only in one of its branches (namely, the law of nations or international law) that positive morality, as considered, without regard to its goodness or badness, has been treated by writers in a scientific or systematic manner. For the science of positive morality as considered without regard to its goodness or badness, current or established language will hardly afford us a name. * * * But, since the science of jurisprudence is not infrequently styled 'the science of *positive law*,' the science in question might be styled analogically 'the science of *positive morality*.' The department of the science in question which relates to international law has actually been styled by von Martens, a recent writer of celebrity, '*positives oder practisches Völkerrecht*;' that is to say, '*positive international law*,' or '*practical international law*.' Had he named that department of the science '*positive international morality*,' the name would have hit its import with perfect precision."¹³

¹⁰ The Province, etc., vol. i, pp. 188-189.

¹¹ Indeed he calls it "a branch of ethics" (Lectures, vol. ii, p. 593).

¹² The Province, etc., vol. i, p. 222.

¹³ The Province, etc., vol. i, p. 177. An objection to this phraseology is admirably pointed out by Professor Westlake: "Austin indeed, proposing the term 'positive international morality' as the substitute for international law, recognized by the word 'positive' some distinction among the mutual claims of states, though not connecting it clearly, if at all, with the general conviction and exercise of or the right of enforcement. But unless it be recognized that the distinction rests on that basis there is danger on the one hand of checking the progress of mankind by depreciating the less ripened claims, and on the other hand of putting claims founded only in sectional or individual interest on a par with those which express the general needs of the international society. The late Prof. Montague Bernard drew attention to the latter of these dangers when he said that 'the fallacy suggested by the phrase

Admitting for a moment Austin's strictures, it is evident that a great deal of the body of international law would be law in the strict sense of the term; for a nation may and does bind itself by treaty, a positive agreement, and a violation of rights under the treaty would lead to a "*command*" from the injured state to the state guilty of the infraction. It would likewise seem to follow that if nations should recognize a custom or the body of customs which make up the law of nations, and give full effect to this custom, when rights depending upon the custom arise and enforce through municipal courts the so-called law, the principle of decision might claim in such a case the epithet of law. The law administered in the various prize courts in civilized states is universal, practically identical, and is enforced by process of court. Each specific instance would make this law, at least for the purposes of the case, municipal law and the sanction required by Austin's definition would clearly be present. Austin would indeed allow the quality of positive law to these various instances, but he maintains that the law so applied becomes municipal or national law and loses the character of international law.

He would, however, permit it as a special privilege to be termed international, although in legal parlance it should be termed national, as distinct from international. If it be supposed that a state adopts the whole body of what is variously called international law, or law of nations, and incorporates it into its fundamental constitution, so that the difference between the origin and form be merged in the adjudications of the courts, as is the case in the United States, where our courts administer it as the law of the land, still the law in question would be simply municipal, or, at most, the international law of the adopting state. For in the language of Mr. Austin:

Each state may, however, adopt an international law of its own; enforcing that law by its own tribunals, or by its military force (at least) as against other nations.¹⁴

"international morality" is a more practically mischievous one than the fallacy suggested by the phrase "international law," because the temptation to overstrain legal analogies and clothe mere opinions indiscriminately in the robe of law is less dangerous than the contrary tendency to degrade fixed rules into mere opinions' (Four Lectures on Subjects Connected with Diplomacy, p. 171). It is submitted that both fallacies may be avoided if we decline to treat the law of the land as the only proper kind of jural law, for then, while keeping law distinct from morality we shall not encourage an undue attribution to international law of the character only appropriate to the law of the land" (Principles of International Law, pp. 13-14).

¹⁴ The Province, etc., vol. ii, p. 594.

It would, however, be law in the strictest sense of the word.*

To push the matter to extremes, suppose that the civilized world should adopt one and the same uniform code and establish courts for its administration. Would not the result be a common law of nations, the law of nations so-called? In a word, international law?

No, says Mr. Austin:

If the same system of international law were adopted and fairly enforced by every nation, the system would answer the *end* of law, but, for want of a common superior, could not be *called so* with propriety. If courts common to all nations administered a common system of international law, this system, though eminently effective, would still, for the same reason, be a *moral* system. The concurrence of any nation in the support of such tribunals, and its submission to their decrees, might at any moment be withdrawn without *legal* danger. The moral system so administered would of course be eminently precise.¹⁵

✶ A definition which denies the name of law to that which is administered in a court of law must either be faulty in its nature or too narrow; for to ascertain and administer the law of the land is the very purpose for which courts of justice are established. The law of the land may be morally as well as legally binding, but the court administers law, not morality, unless, indeed, law be interchangeable or synonymous with positive morality. It is submitted that the Austinian conception thus tested results in an absurdity or in a mere quibble about names as such, in which the essence is sacrificed to the form.

✶ The difficulty inherent in the Austinian conception seems to consist in the fact that Austin and his followers have analyzed law as an existing system, if, indeed, the system as such has ever existed or does now exist in a perfect form. It is admitted that a law possessing the Austinian essentials is a positive law in the strictest sense of the word. It is maintained, however, that the definition is narrow, contracted, and unbending. And necessarily so, because Austin has disregarded law in the various phases of its growth. Now law is not a cut-and-dried system; it is an organism and the result of organic growth. That which we call law and enforce as such did not exist in former times in the perfection and completeness required by Austin.¹⁶ And it is

¹⁵ Lectures, vol. ii, p. 594.

¹⁶ "The want of international organization chiefly makes itself felt, so far as concerns international rules, in the imperfection of the power to define and develop them. But that is a defect from which the law of the land is not always exempt in countries

equally true that that which was considered as law, and justly, because it was administered as such in times past and in primitive communities, would not be considered as law today in the Austinian use of the term. And yet it was law in its day and generation, and we must therefore look upon it as law, even although it lacked that which we regard as an essential characteristic. Take a single instance and one which goes, it is submitted, to the very root of the Austinian conception. International law is not and cannot be law because of ~~the lack of the sanction~~ necessarily included in his definition. A vastly learned and careful writer, whose knowledge of the law and its history go hand in hand, says that—

Courts have existed with an elaborate constitution and procedure and no compulsory powers whatever. This is the state of things which we read of as prevailing in Iceland not much before the Norman Conquest. No doubt there are fabulous details even in those sagas, that of *Njáls*, for example, which contain most historical matter; but their general account of society and institutions may be taken as truthful enough for our purpose.¹⁷

That is to say that the municipal laws of England and the United States are more perfect, and that the Icelandic conception was less perfect, but we should scarcely deny the quality of law to the Icelandic system. And indeed it would seem that the presence of a sanction is not essential to the quality of law, for the law as such is simply a rule of conduct, and is neither self-applying nor self-executing. The rule of conduct exists, and in a perfect state, whether it be enforced or not. If enforced it is enforceable; if it is not enforced that does not

which have attained some considerable degree of advancement. Take, for instance the laws of England in the period of Glanville and Bracton, say the reigns from Henry the Second to Henry the Third, when old local customs, new feudal principles and habits of action, and a good deal of Roman law, then lately made known in this country, were being fused together into one common law, and that by the judges, to whom but little express legislative help was given before Edward the First. While the process was going on, uncertainty reigned over as large a part of the laws of England as the part of international law over which it now reigns. And if we add the private violence, which then exceeded in frequency and impunity the public violence of European states in the nineteenth century, it may safely be said that international law is now not less certain and better obeyed than was the law of England till the process referred to was fairly complete." (Westlake's *Principles of International Law*, pp. 8-9.)

¹⁷ Sir Frederick Pollock's *Sources of International Law*, 2 *Columbia Law Review*, pp. 514, 515.

imply that it is unenforceable either in this or other instances. In other words, the sanction is not an inherent part of the law as such, and the law may exist irrespective of its enforcement.¹⁸ The court deals with the law and interprets it; the executive enforces it or fails to do so, as the case may be. It is true that a sanction in some form is present in the ordinary conception of law, and the absence of a sanction or penalty in a criminal law, for example, would prevent its enforcement. But the *actual* enforcement or enforceability upon which Austin relies is not a part of the rule itself, but is something external and independent, and is indeed predicated upon the existence of the law.

"With regard to this contention," says Sir Frederick Pollock, "it seems fit to be considered that in the early history of all jurisdictions the executive power at the disposal of the courts has been rudimentary, if indeed they had such power at all. It is not universally true that even the highest courts in the most civilized modern states can always enforce their judgments. Thirty years before the American Civil War the state of Georgia defied the Supreme Court of the United States for eighteen months, with the open connivance of the President of the United States [Andrew Jackson]: 'John Marshall has made the decision; now let him execute it!' But the decision by John Marshall stands as part of the law of the United States, and would do so even if its execution had been wholly frustrated in this particular case. In the middle ages there was nothing uncommon in rival courts within the same political allegiance obstructing one another's process and thwarting one another's jurisdiction in every way short of violence."¹⁹

And a further illustration of the present contention may be cited from the law of extradition. The Constitution of the United States provides that—

a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.²⁰

In pursuance of this constitutional provision, Congress enacted that—

Whenever the executive authority of any state or territory demands any person, as a fugitive from justice, of the executive authority of any state or territory to which such person shall have fled * * * it shall be

¹⁸ See the remarkable passage in Salmond's *First Principles of Jurisprudence*, pp. 95-106.

¹⁹ 2 *Columbia Law Review*, 514.

²⁰ Article IV, Sec. 2, Clause 2.

the duty of the executive authority of the state or territory * * * to cause him [the fugitive] to be arrested and secured," etc.²¹

Now, suppose the demand is made in the form provided by the statute, and suppose an extraditable offense has been committed, the "duty" of the executive is clear, and it rests upon a Congressional enactment authorized by an express, not an implied, provision of the Constitution. In such a case, says Judge Cooley,

it is the duty of the executive on whom it is made to respond to it, and he has no moral right to refuse.²² Nevertheless, if he does refuse, no power has been conferred on the Federal Courts to compel obedience.²³

That is to say, a clear constitutional, hence a legal, right exists on the one hand and a constitutional and legal duty on the other without any means of enforcing the right.²⁴ The law exists and it is law, but the sanction is absent. This may well make the law one of imperfect obligation, but does not convert it into mere morality, and it is highly probable that Mr. John Bassett Moore's valuable treatise on extradition will continue to adorn the shelves of law offices rather than grace the drawing-rooms of philosophers, moralists, and preachers of the gospel. In like manner the fallacy underlying the theory of the sanction in law might be illustrated still further. For example, the Constitution declares that the

judicial power shall extend * * * to controversies to which the United States shall be a party; to controversies between two or more states.²⁵

Now, suppose state A sues state B in the Supreme Court of the United States and gets judgment; in what manner may the judgment in favor of A be executed against B? Or suppose the United States wishes to sue a state of the Union, and the state files a cross-bill upon which judgment is given against the United States. How can this judgment be executed? And yet the judge would be astonished to be told that

²¹ Rev. Stat. U. S., Secs. 5278, 5279.

²² See the leading case of *Kentucky v. Dennison* (1860), 24 How. 66, per Taney, C. J.

²³ Cooley's *Principles of Constitutional Law* (3d ed.), p. 210.

²⁴ Take another illustration from the Constitution. Article V says Congress "*shall*" under certain conditions "propose amendments," and "*shall* call a convention." The duty is clear, but how can it be enforced?

Again: Suppose a state renders itself obnoxious to the XIVth Amendment, section 2. In such a case "the basis of representation therein *shall* be reduced * * * ." How can this duty be legally enforced?

²⁵ Article III, Sec. 2.

he was not dealing with law; that he was at most *censor morum*, discussing a question of morality, interesting but non-legal, if not illegal, because unenforceable. But enough has been said, it is hoped, to establish the contention that the sanction, although usually accompanying, is not absolutely indispensable to the conception of law. Or in other words, law is conceivable without a sanction.

But suppose, for the sake of argument, that the sanction is necessary. The question at once arises, What kind of sanction? Is there but one or may there be many? Austin's answer is clear, precise, and to the point. In a later passage this definition is further expanded and explained as follows:

The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken, is frequently called a *sanction*, or an *enforcement of obedience*. Or (varying the phrase) the command or the duty is said to be *sanctioned* or *enforced* by the chance of incurring the evil. Considered as thus abstracted from the command and the duty which it enforces, the evil to be incurred by disobedience is frequently styled a punishment.²⁶

A party lying under a duty, or upon whom a duty is incumbent, is liable to evil or inconvenience (to be inflicted by sovereign authority) in case he violate the duty, or disobey the command which imposes it. The evil to be incurred by the party in case he disobey the command, *enforces* compliance with the command, or secures the fulfilment of the duty. In other words, it inclines the party to obey the command, or to fulfil the duty or obligation which the command imposes upon him. By reason of his liability or obnoxiousness to the eventual or conditional evil, there is a *chance* that he will *not* disobey: A chance which is greater or less (foreign considerations apart), as the evil itself, and the chance of incurring it by disobedience, are greater or less. The eventual or conditional evil to which the party is obnoxious, is styled a "*sanction*;" or the law or other command is said to be *sanctioned* by the evil.²⁷

Interrupting Austin for the moment, it is clear that the instance, previously cited, of extradition and suits against sister states fall outside of Austin's definition, inasmuch as disobedience is not controlled or obviated by a legal evil, and it is only legal evils with which the learned analyst is concerned.

There is but one kind of sanction in the Austinian conception, for although a distinction exists between civil injuries on the one hand and crimes on the other, the end sought is the same, namely, enforce-

²⁶ The Province, etc., vol. i, pp. 91-92.

²⁷ Lectures, vol. i, pp. 457-458.

ment of obedience to the command. The means may indeed differ; the end is the same. Or, to quote Austin:

It is equally true, that where the injury is considered civil, the proximate end of the sanction *is* (generally speaking) redress to the injured party. But, still, the difference between civil injuries and crimes, can hardly be found in any difference between the ends or purposes of the corresponding sanctions. For, * * * although the proximate end of a civil sanction, *is*, generally speaking, redress to the injured party, its remote and paramount end, like that of a criminal sanction, is the prevention of offenses generally. * * * It cannot be said that civil and criminal sanctions are distinguished by their ends or purposes.²⁸

It should perhaps be mentioned, before passing to a criticism of the term sanction as thus defined and explained, that Austin has divided all law or laws into three classes:

Laws properly so-called, with such improper laws as are closely analogous to the proper, are of three capital classes: 1. The law of God or the laws of God. 2. Positive law, or positive laws. 3. Positive morality, rules of positive morality, or positive moral rules.²⁹

As to the sanctions annexed to these various laws, he says:

The sanctions annexed to the laws of God may be styled *religious*. The sanctions annexed to positive laws may be styled, emphatically, *legal*: for the laws to which they are annexed are styled, simply and emphatically, *laws or law*. * * * Of the sanctions which enforce compliance with positive moral rules, some are sanctions properly so called, and others are styled *sanctions* by analogical extension of the term: that is to say, some are annexed to rules which are laws imperative and proper, and others enforce the rule which are laws set by opinion. Since rules of either species may be styled positive morality, the sanctions which enforce compliance with rules of either species may be styled *moral* sanctions. Or (changing the expression) we may say of rules of either species, that they are sanctioned or enforced *morally*.³⁰

With the laws of God this paper has nothing to do. In regard to the second and third categories, it is submitted that the term "sanction," correctly applied to positive law, is too narrow and exclusive to be of permanent importance; for, broadly speaking, the means by which the rule of law is enforced is the sanction, and if the sanction—whether it be religious, legal, or moral—renders the party obnoxious to an evil, so that the command of the superior is obeyed, then it has served the purpose for which the term sanction is used. There is

²⁸ Lectures, vol. i, pp. 520-521. The subject is further expounded in pp. 521, 524.

²⁹ The Province, etc., vol. i, pp. 199-200.

³⁰ *Ibid*, p. 200.

no magic in the mere word or phrase: the sanction is not an end in itself—it is at most a means to an end, namely, obedience to the command or rule of law. Any means, therefore, which produces the end has the force of a sanction in the particular instance, and if it have the force of a sanction, there seems to be no reason in the nature of things why it should not be called a sanction. If the means employed be not wrong in its nature and if it produces the end, namely, compliance with a legal command, why should it not be termed a legal means or sanction? If it be found that a moral sanction, so called, produces or enforces compliance with the command, for example, of public opinion, why should not public opinion, in so far as it produces the desired result, namely, obedience, be regarded as a legal sanction? Every-day experience shows the persuasive force of public opinion, and it is perhaps not too much to say that public opinion is more compelling in its nature than a sanction, be it never so legal. The evil threatened is not necessarily or immediately imprisonment or legal punishment, but social ostracism, which is as controlling, if indeed it be not more controlling. The threat of imprisonment does not do away with the jail; but the fear of public opinion or social ostracism keeps many a weak-minded or frail being on this side of the bars. Again, it is common knowledge that a law with the appropriate legal sanction is not and cannot, for any length of time, be enforced in the teeth of public opinion, and many a law on the statute book is, for all intents and purposes, a dead letter. The history of criminal law in England furnishes a thousand and one instances of the truth of this.

The conclusion would seem to be, therefore, that the sanction, as defined by Austin, if applicable at all to law, is only applicable in a restricted sense. It is at best one of several sanctions equally effective to produce obedience to the command or the law in the strict sense. The term is accurate in the ideal case supposed by Austin; but the term as limited by him is narrow, restricted, and misleading, because excluding the various means by which the end sought is ordinarily accomplished.

Admitting, therefore, that a sanction, in the Austinian sense, ordinarily accompanies law in its purely legal sense, although it has been shown that the law administered by courts is not always, or indeed necessarily, dependent upon the presence and existence of the purely

legal sanction, as in the cases of extradition and suits between the states, it is objected that the sanction defined and required by the analytical school of jurisprudence is too narrow and exclusive in its nature to answer the requirements of courts of justice as at present organized and existing.

A further and more serious objection to the term as used arises from the statement that Austin is considering almost exclusively the municipal law of a state. He finds certain elements present in the ideal municipal law. He therefore assumes that these elements are and of necessity must be present. One answer to this has been given, namely, that although present today they have not always existed, or, if they existed, that they were at least in a rudimentary or imperfect state. The lack of historical survey and perspective vitiates his conclusions. For as Sir Leslie Stephen aptly says, in speaking of the Austinian view:

It seeks to explain the first state of society by the last, instead of explaining the last by the first.³¹

But admitting the correctness of his conclusions, does it of necessity follow that municipal law is the only form of law or that the essentials of a perfect municipal law exist and must exist in what is termed an international law? Is it not possible that two systems of law, municipal and international, may co-exist, and that each may be enforced in a different way corresponding to the nature of one and the other? May there not be a sanction for the municipal law and a different but no less binding sanction for the law of nations? Does one medicine cure all diseases, or is there a specific for a malady of another and a different nature?

Austin would negative these various assumptions, thereby following in the footsteps of the father of English analytical jurisprudence, Jeremy Bentham, who felt it a congenial and by no means an impossible task to prepare a universal code for all peoples, notwithstanding differences of time, place, origin, and capacity.

Now, it is submitted that there are certain fundamental differences between municipal law, on the one hand considered as the binding laws of a single isolated and highly organized state or community, and international law, the collection of uses and customs regulating the con-

³¹ English Utilitarians, vol. iii, p. 331.

duct of states of the modern civilized world.³² And it is maintained that the sanction in one case may be and is necessarily different from the sanction in the other; but that the sanction, if existing in international law, is no less worthy of respect and consideration, provided it answers the purpose for which it exists, namely, to secure the enforcement of the uses and customs composing the law of nations, be it never so different, informal or indeed formless, provided only and always that it secures obedience to the uses and customs established through the course of years, and accepted as binding and enforceable by the universal consent of civilized nations of the present day.

But the difference assumed between the municipal law on the one hand and international law on the other is not so great as would appear at first sight, for international law is, if it be law, a growth of usage and custom. In this respect it is similar to the common or customary law in the resultant law, although it differs materially in its origin. The common law is nothing but customary law, the origin of which is shadowy and uncertain, if indeed it be known. It grew up to meet the needs of a simple community, and, meeting those needs, it was recognized promptly and properly as a rule of conduct. It was not the command of a superior, nor was it imposed from without, nor did its observance require a sanction in the analytical sense. It was administered between man and man by man, and when courts existed it was the duty of the courts to declare, administer, and enforce it in the particular instance. From the very nature of things the technical sanction was lacking; indeed it could not exist, because it simply grew without imposition by or indeed without a thought of a superior. The decree of the court was really sanctioned. Or, to borrow Sir Leslie

³² In his masterly work on International Law, the late W. E. Hall gave the following definition:

"International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement."

Professor Westlake, in his recently published book on International Law, Part I (1904), sets the high seal of his approval on this definition in the following words: "We have regarded our subject exactly in the light in which it is placed by Hall," p. 8.

So considered, international law is stripped of the matters of good form, taste, dress, and ceremony with which many of the older treatises on the subject are encumbered. In this light, the law of nations stands or falls as a legal system.

Stephen's happy phrase: "Custom is not really the creature of law, but law the product of custom."³³ Austin's requirements are best met and indeed they are only met perfectly, by the statute; but a system of law and a definition which would exclude the largest part of law could make little or no pretense to accuracy. It was therefore necessary for Austin to include the common or customary law in his system of positive jurisprudence. In so doing the "sovereign" cuts but a sorry figure, and the inferior is very much of an equal.³⁴

To revert to the customary law. It did not matter whether the custom was wholly indigenous or not, provided only that it was a genuine custom; nor did it matter whether the custom were new, provided it was wholly accepted. Nor was it important that the rule of conduct prescribed by the custom was a conscious or unconscious development or a more simple or more primitive usage. A familiar illustration of this customary growth and development is the law merchant, which, as Sir Frederick Pollock admirably points out:

has been so thoroughly assimilated by the national laws of all civilized countries that, as regards its separate existence, it may be said to have perished by the completeness of its own victory. But, like the law of nations, it was originally independent of municipal systems, and claimed the respect and aid of local magistrates as a branch of the law of nature,

³³ English Utilitarians, vol. iii, p. 328.

³⁴ "Probably nobody," says Sir Henry Maine, "ever found a difficulty in allowing that laws have the character given to them by Austin, so far as such laws have proceeded from formal legislatures. But many persons, and among them some men of powerful mind, have struggled against the position that the great mass of legal rules which have never been prescribed by the organ of state, conventionally known as the legislature, are commands of the sovereign. The customary law of all countries which have not included their law in codes, and specially the English common law, has often had an origin claimed for them independently of the sovereign, and theories have been propounded on the subject which Austin scouts as mysterious and unintelligible. The way in which Hobbes and he bring such bodies of rules as the common law under their system is by insisting on a maxim which is of vital importance to it—'whatever the sovereign permits he commands.' Until customs are enforced by courts of justice, they are merely 'positive morality,' rules enforced by opinion but, as soon as courts of justice enforce them, they become commands of the sovereign, conveyed through the judges who are his delegates or deputies. It is a better answer to this theory than Austin would perhaps have admitted, that it is founded on a mere artifice of speech, and that it assumes courts of justice to act in a way and from motives of which they are unconscious." (Early History of Institutions, pp. 364-365.)

And again: "Customary law—a subject on which all of Austin's remarks seem to me comparatively unfruitful—is not obeyed, as enacted law is obeyed." (*Ibid.*, p. 394.)

considered as a body of rules demonstrable by natural human reason, and therefore entitled to universal obedience.³⁵

It has been said that international law is the body of usages and customs, binding modern civilized nations in their common intercourse. Treaties as a class are excluded from present consideration because a treaty of nation A with nation B is a statute of nation A and nation B, and for the further reason that a treaty merely binds parties to it. Third parties cannot be bound unless they assent to it, and hence the treaty cannot be said to form part of the usage and customs of nations. It is, therefore, municipal in its nature, and is in every civilized country enforceable within the contracting country and their courts as ordinary statute law. The usage or custom is different in its origin, although its effect is one and the same. Just as the customs grew up within the realm, and formed in the course of time the common law or general custom as distinguished from the local or particular custom in force and enforceable with this locality—the law of gavelkind, for example—the customs and usages obtaining between nation A and nation B in their mutual relations grew into a rule of conduct mutually observed by them in guiding and determining their intercourse. Nations B and C applied the same principles of conduct in their intercourse, so that in the course of time, quietly and imperceptibly it may be, the body of nations found themselves employing in whole or in part this same body of usages and customs. The nation consented to the usage or custom because it enforced it, or rather applied it, and in like manner the nations generally consented to it; for, by enforcing it against others, the nation was bound perforce to permit its application to itself as the measure of its rights against others, and as the measure of the rights of others against it. In this manner, whether by analogy to the law of nature of the *jus gentium* of the Romans, or from a sense of the reasonableness of the transaction, or it may be from the necessity of the case, a common law of nations grew into existence and assumed a recognized and definite shape and form.³⁶

³⁵ The Sources of International Law, 2 Columbia Law Review, pp. 517-518.

³⁶ For a statement of the necessity of an international law and the manner in which it originated, see the admirable account in Hall's International Law, 1st edition, Appendix I.

The language of Mr. Webster as Secretary of State may not be amiss: "Every nation," he says, "on being received, at her own request, into the circle of civilized

A new nation born into the world found its rights recognized and measured by this informal code, and the citizens of the respective nations acknowledged this law of nations, because as citizens of a law-giving nation they were bound to observe that which the nation recognized and promulgated as a law, or as having the force of law in matters international.

Now, it is indisputable that nations so recognizing this body of usages and customs have existed at least since the middle ages, and it is more than a metaphor to call those so doing, the family of nations; for the term at once shows the bond uniting them, and the line of demarcation between them, as a whole, and uncivilized countries that neither respect nor know the rights of others.

Now, the very moment that a nation admitted the existence of a rule of conduct, it naturally bound its subjects and citizens to its recognition and the correlative duty of its observance. The custom or duty—in a word, the law of neutrality, for example—not only limits the action of a member of the family of nations, but the recognition of the law by the state fixes at once the duty of the citizen to observe the neutrality. It follows, therefore, that the adoption of a rule or custom by a state imposes the obligation of its observance upon subject and citizen alike. For a state is nothing but a political body or

governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws and usages which have obtained currency among civilized states * * * . (6 Webster's Works, 437.)

Not only is this true of nations; it was true of the original states of the American Union. For example: "The first crime in the indictment is an infraction of the law of nations. This law, in its full extent is part of the law of this state [Pennsylvania], and is to be collected from the practice of different nations, and the authority of writers" (*Respublica v. De Longchamps* (1784) 1 Dall. 111). It is to be noted that this case was decided before the formation of the present Constitution.

The text is forcibly confirmed by the language of Chief Justice Taney in *Kennett v. Chambers* (1852), 14 How. 38, where it is said: "The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the law of nations. It lies at the foundation of all government, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to citizens of the United States."

corporation existing for the benefit of its corporate members, subjects and citizens, and the state has no rights in its individual or corporate capacity. The state has indeed rights not possessed by an individual member, such as the right of embassy, for example, but these various rights are for the benefit and protection of subject or citizen, not purely personal rights of the personal sovereign as formerly considered.³⁷ It may, therefore, be said that these rights in general are the rights of the subjects or citizens as such, and the state is simply the body corporate charged, in a representative capacity, to protect the citizen, without as well as within the territorial limits of the state in question. Take, for instance, a boundary question between two independent states. This may seem at first sight to be purely a question between two sovereignties. In reality, however, it is not; for it involves, necessarily, the rights of citizens of state A in a portion of the territory claimed by the citizens of state B. That is to say, the citizens of state A claim a right to enter into the disputed territory, to settle there permanently, and carry on their various pursuits, secure in the protection of the laws of their country. The state, therefore, when it acts against B, acts in a representative capacity, not merely because its rights have been denied or violated, but because the rights of its subjects or citizens have either been violated or threatened. This is the import of the transaction in contemplation of law, although in a general and loose sense it may be said that the rights of the state have

³⁷ It is not meant to deny that a state, as such, has rights which an individual member lacks. It is meant, however, to emphasize the fact that the corporation possesses these solely for the benefit of the citizens or subjects, and that the rights of the state are measured solely with reference to the needs and benefits of such subject or citizen. In this case the abstract right of the state in any instance is predicated upon the concrete rights of the individual subjects and citizens. In this sense the following passage from Westlake's *International Law* is clear and correct: "We further see by reference to our common experience that a state proper is an ideal body, which on the one hand has a certain territory, and on the other hand is a society composed of individual men as its members and having a corporate will distinct from the wills of its members. And a like reflection will show us since the individual men associated in the state are moral beings, and the action of the state which they form by their association is their action, the state must also be a moral being, having a responsibility and conscience which are the summation of the responsibilities and consciences of its members. In this character of a moral being, having a corporate will, responsibility and conscience, a state is capable of being a subject of law and having rights." (Part I, p. 3.)

been injured or are threatened.³⁸ A careful examination of almost any international problem will resolve itself into this state of facts, so that the claim of a state to the protection of a principle of law necessarily involves and carries with it the right and duty of citizen or subject in the rule, usage, custom, or law invoked. This usage thus becomes not merely a rule for the guidance of the state, but for the guidance, enjoyment, and observance of the individual member of the body politic, and the very claim of the rule in question makes it of necessity a measure of municipal right and duty.³⁹

If, then, the recognition of the body of usages and customs forming the bulk of international law involves their adoption both by the state so recognizing, subjects and citizens thereof, it follows, as said, that the usages and customs of international law become, for the purpose of state and citizen, municipal law of such state and citizen, and that such usages and customs become the common law of each and every state so recognizing and adopting. There then presents itself a body of fixed and binding law—the common law of nations—just as clearly and surely as the common customs and usages of England became the common law of that realm.

The reasoning by which this conclusion is reached may be faulty and open to attack, but the result, it is submitted, is beyond refutation. If the usages and customs are adopted *en bloc* by the statute of a particular state, such statute would be declaratory merely of the usages

³⁸ See the following boundary cases in which the principles of international law were applied, and correctly, to the solution of the difficulty: *Foster and Elam v. Neilson* (1829), 2 Pet. 253, in which the court rightly followed the decision of the political department in its representative capacity; *U.S. v. Texas* (1892), 143 U. S. 621; *Rhode Island v. Mass.* (1838), 12 Pet. 657, and same case at later period (1846), 7 How. 491; *Indiana v. Kentucky* (1890), 136 U. S. 479; *Virginia v. Tennessee* (1892), 148 U. S. 503.

As an admirable exposition of the way in which private rights arise and are regulated by the principles of international law, see the elaborate and careful opinion of Chief Justice Shaw in *Commonwealth v. Blodgett* (1846), 12 Met. 56.

³⁹ The prevalent idea that a personal sovereign has greater rights than a president or chairman of the political corporation may be put down as a popular fallacy or as a remnant of the defunct theory of divine right. A state sues as a state, a political corporation, whether the chairman for the time being happens to be czar, emperor, king, or president. See the following cases from among the many that might be cited: *Republic of Honduras v. Soto* (1889), 112 N. Y. 310; the *Sapphire* (1870), 11 Wall. 164.

See to same effect Westlake's *International Law*; Part I, p. 3.

and customs, and would not be true laws in the Austinian sense. The usages and customs would be the laws, and the declaratory laws, to quote Austin, "are merely analogous to laws in the proper acceptance of the law." And again: "Declaratory laws and laws repealing laws ought in strictness to be classed with laws metaphorical or figurative, for the analogy by which they are related to laws imperative and proper is extremely slender or remote."⁴⁰

Laying aside theory and coming to the realm of tangible fact it will be seen that courts of justice acknowledge and administer international law untroubled by, perhaps unconscious of, the doubts and misgivings of Austin and the analytical school of jurisprudence. For the past two centuries, English judges of the highest repute have declared from the bench that international law is part and parcel of the municipal or common law of the realm. In the case of *Triquet v. Bath* (1764), 3 Burr., 1478, Lord Mansfield, in commenting upon the case of *Buvot v. Barbut* (1736), *Talbot's Cases*, 281, tried before Lord Talbot, said:

Lord Talbot declared a clear opinion, "That the law of nations, in its full extent, was part of the law of England. That the law of nations was to be collected from the practice of different nations, and the authority of writers." Accordingly, he argued and determined from such instances, and the authority of Grotius, Barbeyrac, Binkershoek, Wiquefort, etc., there being no English writer of eminence upon the subject. I was counsel in the case, and have a full note of it.

His Lordship also remarked:

I remember, too, Lord Hardwicke's declaring his opinion to the same effect; and denying that Lord Chief Justice Holt ever had any doubt as to the law of nations being part of the law of England, upon the occasion of the arrest of the Russian ambassador.

When it is noted that Messrs. Blackstone, Thurlow, and Dunning appeared for the plaintiff, it is at once evident that the case was carefully argued, thus giving additional weight to the measured judgment of the court. Three years later, in *Heathfield v. Chilton* (1767), 4 Burr., 2015, the same learned judge said:

The privilege of public ministers and their retinue depend upon the law of nations, which is part of the common law of England. And the act of Parliament of 7 Ann. c. 12 [concerning the immunities of

⁴⁰ *The Province, etc.*, vol. i, p. 219.

diplomatic agents] did not intend to alter, nor can alter, the law of nations."⁴

And in Blackstone's Commentaries, published in the four years from 1765 to 1769, the learned commentator, who had been of counsel in *Triquet v. Bath*, and, therefore, spoke with peculiar knowledge and authority, said:

The law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted to its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom, without which it must cease to be a part of the civilized world. (Commentaries, Bk. IV, ch. 5, 67.)

It may not be without interest to note that Sir Robert Phillimore, likewise commentator and judge of wide experience, says briefly in confirmation of Blackstone:

In England it has always been considered as a part of the law of the land. (Commentaries on International Law, vol. i, 78.)

And the late Mr. Joel P. Bishop cites this very passage as representing the law in his own as well as Blackstone's day:

"Governments," Mr. Bishop says, "like individuals, cannot exist together without law to regulate their mutual relations; hence the law of nations. It is in truth common law (4 Bl. Com.); or, rather, the common law has appropriated the law of nations, making it a part of itself. (1 New Crim. Law, 8th ed. (1892), §483.)

This measured statement of the learned commentator, based as it was upon judgments of the courts, has in time served as authority to the bench and bar of his country. To take a simple example from the report. In the leading case of *Emperor of Austria v. Day and Kossuth* (1861), 2 Giffard, 628, 678, Sir John Stuart, V. C., said, in discussing the right of a friendly sovereign to enjoin in England the issue of spurious coin of his realm:

⁴ The language of our own Supreme Court is in point: "Sections 4062, 4063, 4064 and 4065 were originally sections 25, 26, 27 and 28 of the Crimes Act of April 30, 1790, c. 9, 1 Stat. 118; and these were drawn from the statute of Anne, c. 12, which was declaratory of the law of nations, which Lord Mansfield observed in *Heathfield v. Chilton*, 4 Burrow, 2015, 2016, did not intend to alter and could not alter." Per Fuller, C. J., in *re: Baiz* (1889), 135 U. S. 403, 420.

If the question related merely to an affair of state, it would be a question, not of law, but for mere political discussion. But the regulation of the coin and currency of every state is a great prerogative right of the sovereign power. It is not a mere municipal right, or a mere question of municipal law. Money is the medium of commerce between all civilized nations; therefore, the prerogative of each sovereign state as to money is but a great public right recognized and protected by the law of nations. A public right, recognized by the law of nations, is a legal right, because the law of nations is part of the common law of England.

These propositions are supported by unquestionable authority. In the modern version of Blackstone's Commentaries (4 Steph. Com. 282) it is laid down (and it has so always been held in our courts) that the law of nations, wherever any question arises, which is properly the object of its jurisdiction, is adopted in its full extent by the common law of England, and held to be part of the law of the land.

And such is the language of the law courts in the Great Britain of today, although the contrary was held by a majority of one in *Regina v. Keyn* (1876), L. R. 2 Ex. Div. 63. To overrule this decision and make the laws of England conform to the law of nations, the declaratory act of 41 and 42 Viet., c. 73, was passed within two years of this discredited and universally criticised judgment. The important part of the act for the purposes of this article is as follows:

The territorial waters of her majesty's dominions, in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of her majesty's dominions, as is deemed by international law to be within the territorial sovereignty of her majesty.

The preamble declares that "the rightful jurisdiction of her majesty * * * extends and has always extended" over such bodies of water.

Or, to quote the language of Sir Henry Maine:

In one celebrated case [*Regina v. Keyn*], only the other day, the English judges, though by a majority of one only, founded their decision on a very different principle, and a special act of Parliament was required to reestablish the authority of international law on the footing on which the rest of the world had placed it. (International Law, pp. 38, *et seq.*)

But the matter does not rest here, for in the course of the year 1905 an English court has had occasion to consider carefully the nature and relation of the law of nations to the law of England. The various decisions of Lords Talbot and Mansfield in *Buvot v. Barbut*, *Triquet v. Bath*, *Heathfield v. Chilton*, were referred to and followed as correct and, therefore, binding expositions of the law.

1905

The far-reaching importance of the case makes it advisable to state in some detail the facts as well as the opinion of the court in *West Rand Central Gold Mining Company v. The King*, L. R. (1905), 2 K. B. 391. It appeared that within the month preceding the outbreak of the war between the South African Republic and Great Britain, certain officials, acting on behalf of the Transvaal government, seized a quantity of gold, the product of the plaintiff's mine, and it further appeared as a matter of law that the Transvaal government was liable to return the gold or its value to the plaintiff.

The counsel for plaintiff based the right to recover upon three grounds: First, that, by international law, the sovereign of a conquering state is liable for the obligations of the conquered; secondly, that international law forms part of the law of England; and, thirdly, that rights and obligations which were binding upon the conquered state must be protected and can be enforced in the municipal courts of the conquering state.

Inasmuch as the court took jurisdiction of the case, it is evident, therefore, that both the nature and status of international law were necessarily involved, as well as its binding effect upon British courts of justice.

A portion of the opinion of Lord Chief Justice Alverstone—well known as Sir Richard Webster to international tribunals—follows:

The second proposition urged, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized state would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between

various nations. We adopt the language used by Lord Russell of Killoween in his address at Saratoga in 1896 on the subject of International Law and Arbitration: "What, then, is international law? I know no better definition of it than that it is the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another." In our judgment, the second proposition for which Lord Robert Cecil contended in his argument before us ought to be treated as correct only if the term "international law" is understood in the sense, and subject to the limitations of application, which we have explained. The authorities which he cited in support of the proposition are entirely in accord with and, indeed, well illustrate our judgment upon this branch of the arguments advanced on behalf of the suppliants; for instance, *Barbuit's Case*, Cas. t. Tal. 281; *Triquet v. Bath*, 3 Burr. 1478, and *Heathfield v. Chilton*, 4 Burr. 2016, are cases in which the courts of law have recognized and have given effect to the privilege of ambassadors as established by international law. But the expressions used by Lord Mansfield when dealing with the particular and recognized rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be construed so as to include as part of the law of England opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and *a fortiori* if they are contrary to the principles of her laws as declared by her courts. The cases of *Wolff v. Oxholm*, 6 M. and S. 92; 18 R. R. 313, and *Rex v. Keyn*, 2 Ex. D. 63, are only illustrations of the same rule, namely, that questions of international law may arise, and may have to be considered in connection with the administration of municipal law.

And in a thoughtful and learned article, *Is International Law a Part of the Law of England*, the vénéralé Professor Westlake, who had been of counsel in the case of the Emperor of Austria v. Day and Kossuth, discusses at length the decision of the court in the *Rand* case and concludes as follows:

The English courts must enforce rights given by international law as well as those given by the law of the land in its narrower sense, so far as they fall within their jurisdiction in respect of parties or place, subject to rules that the king cannot divest or modify private rights by treaty (with the possible exception of treaties of peace or treaties equivalent to those of peace), and that the courts cannot question acts of state (or, in the present state of the authorities draw consequences from them against the crown).

The international law meant is that which at the time exists between states, without prejudice to the right and duty of the courts to assist in developing its acknowledged principles in the same manner in which they assist in developing the principles of the common law. (22 Law Quarterly Review, 14, 26).

If we now consider the status of international law in the United States, we will find the American in strict accord with the English

doctrine. The first craft that carried an English settler to the New World was freighted with the common law, of which, as we have seen, the law of nations was and is an integral part. Revolution might and did repudiate British sovereignty, but the common law as the measure of individual rights and liabilities withstood the storm and stress of agitation. The nation was born into the family of nations and promptly professed obedience to the law of nations "according to the general usages of Europe" (Ordinance of 1781, Journals of Congress, vii, 185; 1 Kent's Commentaries, 1). Upon the permanent organization of the government, international law was recognized in the Constitution as in the ordinance of the Revolutionary Congress. In Article I, section 8, Congress is specifically empowered

to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

Now, technical words and expressions used in the Constitution, and borrowed from the English system of jurisprudence, such as the common law, equity, admiralty, the law of nations, are to be understood and interpreted as in the system from which they are borrowed, for which no authority need be cited. Were this not so, the time-honored system of trial by jury would not be our heritage as it is that of our ancestors across the water. For, as Mr. Justice Harlan well says:

It must consequently be taken that the word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument. (*Thompson v. Utah* (1898), 170 U. S. 343.)

The law of nations was not something newly created by this clause of the Constitution; it is recognized as existent, to determine whose nature and extent resort must be had to English jurisprudence.

The English cases previously cited and the paragraph quoted from Blackstone show, it is believed, that international law was a part of the common law. As, therefore, the lawyers who framed the provisions of the Constitution were trained in the common law, and were familiar with its principles from a careful study of the Commentaries, it is impossible to consider the law of nations other than as a part of the common law of England, and by the Constitution of the United States it is, therefore, a fundamental and integral part of our jurisprudence.

But there is another not less potent argument for this view. Congress is given power to punish offenses against the law of nations. The law of nations is thus contemplated as an existing system and part of our municipal law. Else why is Congress given power to punish the violation? For it is elementary that nations do not, as a rule, punish breaches of foreign law. Infractions of the municipal code are a sufficient tax for judge and legislature. It is likewise elementary that Congress may indeed vary the law of nations in so far as our citizens are concerned, and that the courts would be compelled to give effect to the statute; but it is equally clear that the act of Congress in such cases would be construed with evident reluctance and great strictness.

In the case of the *Charming Betsy* (1804), 2 Cr. 64, 118, Mr. Chief Justice Marshall said:

It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

And in the *Nereide* (1815), 9 Cr. 388, 423, the same eminent authority said:

Till such an act [of Congress] be passed, the court is bound by the law of nations, which is a part of the law of the land.

And as Mr. Bishop has gravely and impressively expressed it

Doubtless if the legislature, by words admitting of no interpretation, commands a court to violate the law of nations, the judges have no alternative but to obey. Yet no statutes have ever been framed in form thus conclusive; and if a case is *prima facie* within the legislative words, still a court will not take the jurisdiction should the law of nations forbid.

Again:

All statutes are to be construed in connection with one another, with the common law, with the Constitution, and with the law of nations. (Bishop's *Crim. Law*, 7th ed., 60, 69. See also 8th ed., §124.)

If the matter rested here, the true construction of this fundamental passage might well be in doubt, but the courts have passed upon it and its meaning in numerous cases. The binding effect of international law has been held in a variety of cases from the institution of our federal courts to the present day, and there is not a well-considered case to be found in the books that declares international law to be

other than municipal law of the United States. An early and carefully considered case is *United States v. Smith* (1820), 5 Wheat. 153, in which the Supreme Court held, per Story, J., that an act of Congress of 1819 referring to the law of nations for the crime of piracy is a Constitutional exercise of the power of Congress to define and punish that crime; and that the crime of piracy is defined by the law of nations with reasonable certainty. In the act of Congress referred to, the act of piracy as defined by the law of nations was held sufficient without further definition because international law is part of our municipal law.

A recent and by much the most authoritative case on the subject is the *Paquete Habana v. United States* (1899), 175 U. S. 677, in which the late Mr. Justice Gray of the Supreme Court squarely held the doctrines advanced by Lords Talbot, Hardwicke, Mansfield, and Sir William Blackstone, and incorporated in numerous decisions of the august tribunal of which he was a member. The case arose out of a capture in the recent Spanish-American war of two Spanish boats, the *Paquete Habana* and the *Lola*. The question before the courts was, Are fishing smacks in the absence of municipal law or treaty protected from capture by the law of nations, and is such a law of nations part of the municipal law of the United States? In deciding the first question in the affirmative, the learned judge said:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

In this remarkable opinion, not only is international law held to be law in the legal sense of the word, but the sources of that international law binding upon our courts are sketched with a masterly hand. It is submitted that this case settles the question for an American lawyer as well as a decision of a court of final resort can ever settle a matter properly before it, namely, that international law is law; that it is

part of our municipal law; that our courts take judicial notice of it as such.

While this is the approved and oft-repeated doctrine of courts of justice, the language of American publicists is no less uniform and decisive.

Jefferson and Hamilton held opposite and extreme views on questions of foreign and internal policy, but they were one on the question of international law. For example, in a letter to "Citizen" Genet, Mr. Secretary Jefferson stated soundly that—

The law of nations makes an integral part * * * of the laws of the land.⁴

In the "Letters of Camillus," Hamilton examined the subject with the breadth of knowledge and the depth of thought that characterizes his public utterances:

A question may be raised: Does this customary law of nations as established in Europe bind the United States? An affirmative answer to this is warranted by conclusive reasons.

1. The United States, when a member of the British empire, was in this capacity, a party to that law, and not having dissented from it, when they became independent, they are to be considered as having continued a party to it. 2. The common law of England, which was and is in force in each of these states, adopted the laws of nations, the positive equally with the neutral, as a part of itself. 3. Ever since we have been an independent nation we have appealed to and acted upon the *modern* law of nations as understood in Europe—various resolutions of Congress during our Revolution, the correspondence of executive officers, the decisions of our courts of admiralty, all recognized this standard. 4. Executive and legislative acts, and the proceedings of our courts under the present government speak a similar language. The president's proclamation of neutrality, refers expressly to the *modern* law of nations which must necessarily be understood as that prevailing in Europe and acceded to by this country; and the general voice of our nation, together with the very arguments used against the treaty accord in the same point. It is indisputable that the customary law of European nations is as a part of the common law and, by adoption, that of the United States.

Quotation might be indefinitely multiplied and the text overlaid with the word of statesman and author. The American student can well accept a doctrine as fundamental and true which Jefferson and Hamilton stamped with their authority.

⁴ Wait's Am. St. Pap., i, 30; Am. State Papers For. Rel. i, 150; 1 Moore's International Law Digest, 10.

If this be so, it follows that the court takes judicial cognizance of international law as it does of a principle of law purely municipal in its origin. That this should be so in theory, no argument is needed; but an adjudged case will place it beyond the possibility of denial or cavil.

In the case of the *Scotia*,⁴³ the Supreme Court had occasion to examine a question of maritime law, and Mr. Justice Swayne thus expressed himself in delivering the opinion of the august body of which he was a member:

Undoubtedly no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world.

This is not giving to the statutes of a nation extraterritorial effect. It is not treating them as general maritime laws, but is recognition of the historical fact that, by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts but it is not so with the law of nations.⁴⁴

It must be conceded, therefore, that these usages and customs, however arising, provided they have the express or tacit consent of the family of nations, are part and parcel of municipal law and will be—nay, must be—so treated in an American court of justice.⁴⁵

This may well be admitted in a case presented to a court, and the

⁴³ (1871) 14 Wall. 170.

⁴⁴ A rather amusing instance of the extent to which international law is part of the municipal law of the United States, consequently of each state and territory of the Union, was afforded by the recent Gurney-Phelps incident, in which a municipal ordinance of Massachusetts, on the subject of speeding in public thoroughfares, yielded to the claim of diplomatic immunity as sanctioned by international law.

⁴⁵ It may be well to note the following statement from Sir Robert Phillimore: "Most, if not all, civilized countries have incorporated into their own municipal law a recognition of the principles of international law."

"The United States of North America, almost contemporaneously with the assertion of their independence, and the new empire of Brazil, in 1820, proclaimed their national adherence to international law; in England it has always been considered as a part of the law of the land." (Commentaries on International Law, vol. i, p. 78.)

process of the court will enforce its decree as in any other case, for sovereign and sanction are present if either or both be necessary. But many cases arise in which plaintiff and defendant do not come within the jurisdiction of the courts and cannot be reached by summons and process. Or it may be that a foreign state will not recognize the decision of the court affecting its citizen. For example, a judgment of a Venezuela court affecting the claim to territory recently in controversy between Great Britain and Venezuela would not be recognized by Great Britain, and on an appeal to Great Britain the government of that country would espouse the cause of its subject, and threaten with force, in its representative capacity, the state of Venezuela. Inasmuch as there is no common court of appeal to which Great Britain and Venezuela might resort, for equals can have no superior, there is but one way, namely, an appeal to the sword to determine which contention shall prevail.

But suppose the controversy be referred to a board of arbitration or to The Hague Tribunal, such board, commission, or tribunal has no power to enforce its decree. There is no sanction, and hence the principle of right and justice cannot prevail. Or if the countries in question stipulated by treaty in advance to abide by the decision, this submission, says Austin, "might at any moment be withdrawn without legal danger."⁶

To which it might be answered that no rights can accrue under a statute because the sovereign power might at any moment repeal the statute.

This is, however, a real and serious difficulty and raises the question squarely whether a sanction exists in international law when the right in litigation does not arise in the municipal court of one or other of the nations, but arises between two given nations acting in their representative capacity. The reply must be that no *legal* sanction of the kind suggested and required by Austin exists at present in the law of nations, but that obedience to a principle of international law results from public opinion—in this case international opinion.⁷ If express international opinion does not secure obedience to the principle of international

⁶ Lectures, vol. ii, p. 594.

⁷ See Sir Edward S. Creasy's *First Platform of International Law*, pp. 65-76. As a trained lawyer and one-time Chief Justice of Ceylon, his opinion should carry great weight.

right, the nation affected enforces or seeks to enforce the obedience or to redress this disobedience to international rights by war, and

"War," says a learned writer on jurisprudence, "is the last and most formidable of the sanctions which in the society of nations maintain the law of nations."⁴

War is undoubtedly an *evil* annexed to the infraction of international right, and the "fear" or "chance" that war may follow disobedience to a claim of right based upon the usages and customs of nations is surely an *evil* sufficient to satisfy the intelligent citizen of today, even if it failed to meet the technical requirement of Austin.

The fear of war is sufficient in countless cases to prevent the prospective violation of the common law of nations, and the fear of war does in most, if not in all, cases prevent a resort to its *evils*.

It is, therefore, submitted that the usages and customs of international law are, for the very reason that they are the usages and customs of the law of nations, an integral part of the municipal law of each and every member of the family of nations; that the municipal courts of such nations either consciously or unconsciously administer and enforce principles of international law whenever the particular case involving a question of such law of nations comes before them for adjudication; that a sanction, even the strict legal sanction of the analytical jurist, is present in such cases; that cases involving an abstract

⁴ Salmond's *Jurisprudence or the Theory of the Law*, p. 14.

"It may be asked accordingly," says Sir Travers Twiss, "what are the physical sanctions to the rules which regulate the intercourse of nations? It was one of the main objects of the system of Grotius to supply an answer to this question. The right of war *purum piumque duellum* according to the *formula* of the Roman *facials* furnishes the principle. 'War' said the great Athenian orator in the declining days of Athens, 'is the mode of proceeding against those who cannot be restrained by a judicial proceeding; for judicial proceedings are of force against those who are sensible of their inability to oppose them, but against those who are or think themselves of equal strength, war is the proceeding; yet this too, in order that it may be justified, must be carried on with no less scrupulous care than a judicial proceeding. * * * The rules of conduct which govern the intercourse of nations are not improperly considered to form a body of law, strictly speaking, as they have physical sanctions of no ordinary character in the consequences of war. The ruins of Sebastopol [Port Arthur?] bear convincing testimony that this is not a fiction of jurists, but a stern reality of international life.'" (*Law of Nations; Rights and Duties of Nations in Time of Peace* pp. vii-ix.)

Inasmuch as Sir Travers Twiss spent a lifetime at the bar as a successful practitioner in international questions, his opinion has a peculiar technical value.

right in issue between two nations in their representative capacities are settled in accordance with the common law of nations, and that this obedience is compelled either by public opinion, that is, international opinion, or by the last and most formidable sanction known to nations and mankind—war.²

No attempt has been made to formulate a definition of law broad enough to include both municipal law in its narrow and restricted sense, and law as it occurs in the expression "law of nations." The definition of Austin has been criticised and its accuracy questioned, if indeed its inadequacy has not been demonstrated; for it is evident that no definition of law is or can be correct which ignores law as daily administered in a court of justice. It is fair in such instances to presume that the definition of law which excludes the law of the land is inaccurate rather than that the courts administer as law that which is not and cannot be law.

The fundamental objections of the school of analytical jurisprudence to the law of nations as law in the concrete, if not in the abstract, has been examined and criticised, for the further reason that this school has and does deny a legal character to the law of nations, in consequence of which a system, thoroughly legal and scientific in its nature, has fallen into disrepute.⁴⁰

⁴⁰ By way of an apology for refuting Austin's views, Mr. Westlake, perhaps the leading international lawyer of the English-speaking world, says: "It is also necessary because of the dominant position which certain views of John Austin have held in English universities. * * * That eminent thinker rendered great service by elucidating the various elements, psychological states and states of fact, which have to be provided for by the law of a country, and the knowledge which makes up the larger part of what in the English universities is called jurisprudence. But he prefaced his system by analyzing the law of a country into commands addressed by a sovereign to subjects, including in his description of the sovereign all those who participate in the supreme authority. And the definition of the law of a country which resulted from that analysis he gave as the definition of law, so that international law, not being set by an Austinian sovereign to Austinian subjects, was in his view not law at all, but what he called positive international morality. Now this was beside the mark of what followed in his own lectures. In elucidating the elements with which the law of a country must be concerned Austin found no use for his definition of law, perhaps it was impossible to find any; and thus we are fortunately able to retain most of the fruits of his labor, unaffected by the doubt which has at last arisen about that definition." (Westlake's *Principles of International Law*, pp. vi-vii.)

And again: "Whatever merit Austin's analysis may have for the law of a country his treatment of international matters appears to be inadequate, as, notwithstanding

The analytical school, of which Austin is the prophet, has performed a great service in directing attention to the foundations of a scientific jurisprudence, but a devotion to law in the abstract, without an adequate appreciation of the importance of history in the law, has led to a system at once artificial, inadequate and, indeed, inaccurate.

In conclusion, the present writer would like to quote as expressing in an admirable and unexceptional way the true reason for the existence of a system of international law, and the nature of the sanctions by which the system is enforced, a remarkable passage from a work worthy of the highest commendation, but too little known or appreciated at the present day:

'When everything else,' says Sir Robert Wiseman, 'has a law to guide it, inasmuch as no one society, or petty commonwealth, can stand without some law, the like necessity must there needs be of some law to maintain and order the communion of nations corresponding and acting together. The law, which guideth the transactions which are usually observed to arise between grand societies is the law of nations. The strength and virtue of which law is such that a people can with as little safety violate it by any act, how advantageous soever it may seem to be to the whole body; as a private man can in hope to benefit himself infringe the law of his country. Nay, of such power and pre-eminence is the law of nations that no particular nation can lawfully prejudice the same by any their several laws and ordinances, more than a man by his private resolutions. the law of the whole commonwealth or state wherein he liveth; for as a civil law being the act of the whole body politic, doth thereby overrule each several parts of the same body; so there is no reason that any one commonwealth of itself should, to the prejudice of another annihilate that, whereupon the whole world hath agreed.'⁵⁰

"The inadequacy of its sanctions is an imperfection which attaches to international law in common with all other law; for there is no law so practically perfect as to allow no crime to go without punishment, and no wrong without redress. Opinion and force are the only sanctions of law, and international and municipal law, so far as the former is capable of being administered by judicial tribunals, are in this respect not distinguishable. Nor, where this capacity ceases are they specifically distin-

his great ability, it well may have been from his not having given them much attention." (*Op. cit.* p. viii.)

And finally: "We shall probably feel less surprise that the revolt against that [Austin's] nomenclature has now become so general than that a writer of such great ability should have adopted it, and that it should have reigned so long in the legal literature of England." (*Op. cit.* pp. 11-12.)

That mature reflection has only strengthened Professor Westlake in his opposition to Austin's views, see *International Law*, Part I, pp. 5-9 (1904).

⁵⁰ Excell. of Civ. Law, p. 99, *et seq.*; Vatt. i, 283—ii, 53, 70.

guishable by the mischiefs that attend the means that are necessary to enforce them. The evil of which international law justifies the infliction upon an offending state, reaches its unoffending members; but the punishment, which municipal law inflicts upon a criminal, affects his innocent relations. The one is as much law in the strictest sense of the term as the other; but it is not capable of being enforced with as much certainty and as little mischief. The difference is a difference of gradation and not of kind."^u

JAMES BROWN SCOTT.

^u Richard Wildman's *Institute of International Law*, vol. i, pp. 31-32.

THE HISTORY OF THE DEPARTMENT OF STATE.¹

I.

THE DEPARTMENT OF FOREIGN AFFAIRS.

The first Congress of the Revolution assembled in Carpenter's Hall, Philadelphia, September 5, 1774. An address to the king of England was adopted and transmitted to the agents of several of the colonies in London, with instructions to present it to the king. They were to ask the aid of such Englishmen as they might have reason to believe were "friends to American Liberty." The instructions were drafted October 26, 1774, by John Jay and Richard Henry Lee,² and were sent to Paul Wentworth, who represented New Hampshire;³ Charles Garth, a member of Parliament, the agent of South Carolina; William Bollan, agent of the Massachusetts Council; Thomas Life, the agent of Connecticut; Edmund Burke, who had been chosen agent of New York in 1771; Arthur Lee, who held an appointment to succeed Benjamin Franklin as agent of the Massachusetts Assembly; and Franklin himself, who had been appointed in 1765 agent of Pennsylvania, in 1768 of Georgia, in the same year of New Jersey, and in 1770 of the Massachusetts Assembly. For the first time, these agents were deputed to act for the "United Colonies;" but Bollan, Lee, and Franklin, who alone

¹ In 1893 there was published as a part of the exhibit of the department of state at the World's Fair at Chicago a small volume entitled *The Department of State of the United States; Its History and Functions*, by Gaillard Hunt; and this, which is hardly more than a skeleton of what a history of the department of state should be, remains thus far the only work of any importance on the subject. The paper printed in this number of the Review will be followed in the next issue by Part II on the Creation of the Department of State.

² *Secret Journals of Congress*, i, 58.

³ Force's *American Archives* (fourth series), i, 938, gives the names of the colonies these agents represented. Wentworth soon afterwards became a secret agent of the British government, and entered into active correspondence with the Earl of Suffolk and William Eden, furnishing them with information concerning the progress of American affairs. (See Stevens' *Facsimiles of Manuscripts in European Archives Relating to America*.)

according to Franklin, "properly had anything to do with the tea business,"⁴ were the only ones who accepted the office. Their duties were, to a certain extent, diplomatic, and they were the representatives of a power that was soon to become independent.

Before separation from England was actually determined upon, it was resolved that the Continental Congress should conduct the foreign affairs of the colonies. The sketch of articles of confederation submitted July 21, 1775, contained these words in Article V:

That the power and duty of Congress shall extend to the determining of war and peace; *the sending and receiving ambassadors, and entering into alliances (the reconciliation with Great Britain).*

This proposed article pointed clearly to the approaching declaration of independence, as the sending and receiving of ambassadors and forming alliances were attributes of sovereignty.

After independence had been declared, articles of confederation and perpetual union were proposed on July 12, 1776. Article XVII declared:

The United States assembled shall have the sole and exclusive right and power—of determining on peace and war, * * * sending and receiving ambassadors under any character: entering into treaties and alliances, etc.

The draft of the articles submitted by the committee of the whole, August 20, was to the same effect, and this appeared as Article IX in the articles bearing date July 9, 1778, and finally ratified March 1, 1781.⁵ After the colonies had formed a union they made no attempt to separately conduct any foreign affairs of consequence.

The channel through which flowed all action relating to the rest of the world being the Congress, that body made its first effort to provide for a subordinate committee which should have immediate charge of the subject on November 29, 1775, when the committee of secret correspondence was created by the following resolutions:

Resolved, that a committee of five be appointed for the sole purpose of corresponding with our friends in Great Britain, Ireland, and other parts of the world; and that they lay their correspondence before Congress when directed.

⁴ Works (Bigelow), v, 509

⁵ Secret Journals of Congress, 283, *et seq.*

Resolved, that this Congress will make provision to defray all such expenses as may arise by carrying on such correspondence, and for the payments of such agents as they may send on this service.

The members chosen: Mr. Harrison, Dr. Franklin, Mr. Dickinson, Mr. Johnson and Mr. Jay.⁶

Franklin was the chairman and guiding spirit. The committee at once opened correspondence with several residents of Europe, chief among whom were Arthur Lee, who was instructed to communicate with Count Vergennes, in Paris, and Charles W. F. Dumas, a Swiss gentleman, then residing at the Hague, a friend of Franklin's and a student of international law.⁷ The first representative sent by the committee abroad was Silas Deane, of Connecticut. His instructions,⁸ dated March 3, 1776, are to appear in France "in the character of a merchant," as the "Court of France may not like it should be known publicly than any agent from the Colonies is in that country," but to confide to Count Vergennes that he has come "upon business of the American Congress." He is to endeavor to obtain arms and ammunition for the defense of the colonies, and to ascertain whether, in the event of their being "forced to form themselves into an independent state," France would feel disposed to enter into a treaty of friendship and alliance with them.

September 26, 1776, the mission to France was made a commission, with Deane, Franklin, and Jefferson as the members. They were elected by Congress, and a committee composed of Robert Morris, Richard Henry Lee, George Wythe, and John Adams was chosen "to prepare a draft of letters of credence to the commissioners" and their instructions.⁹ Jefferson declining to serve, Arthur Lee was elected in his place.¹⁰ The secret committee was composed at this time of Benjamin Harrison, Richard Henry Lee, John Witherspoon, and William Hooper, but the two last did not act continuously.¹¹

It was decided later to send commissioners to other European states,

⁶ Secret Journals of Congress, ii, 5.

⁷ Parton's Franklin, ii, 3. Dumas afterwards acted with John Adams when the latter was on his mission to the Hague, and held office after the adoption of the Constitution.

⁸ Diplomatic Correspondence, i, 8.

⁹ Secret Journals of Congress, ii, 31.

¹⁰ *Ibid.*, ii, 35.

¹¹ Reports of Committees relating to Department of Foreign Affairs, Library of Congress MSS.

and Franklin and Arthur Lee were selected for Spain, Ralph Izard for Tuscany, and William Lee for Vienna and Berlin.¹²

The functions of the committee of secret correspondence, after its first action, were unimportant, all the instructions to the commissioners abroad being drawn up by Congress upon reports of special committees. Arthur Lee and Thomas Morris, who acted as the commercial agents of the colonies while the committee was still in existence, did not correspond with it, but were under the jurisdiction of the secret committee of Congress, a separate committee from the committee of secret correspondence.

"As all affairs relative to the conduct of commerce and remittance," wrote the latter to the commissioners at Paris, "pass through another department, we beg leave to refer you to the secret committee, and Mr. Thomas Morris, their agent in France, for every information on these subjects."

On April 17, 1777, the title of the committee was changed, and it became the "committee for foreign affairs." The first members were Benjamin Harrison, Robert Morris, Thomas Hayward, Jr., and James Lovell. Hayward did not act after August, and in October John Witherspoon went on the committee, and later Richard Henry Lee. The first secretary of the committee was Thomas Paine, appointed at a salary of \$70 per month.¹³ He severed his connection with it in January, 1779.¹⁴ The chief function of the committee was to furnish the agents of the government abroad with full accounts of the course of events in America. Beyond that it acted simply as an agent to execute the orders of Congress, and was intrusted with few of the duties that subsequently pertained to it. The members of the committee were being constantly changed, and the communications reflected the opinions of those who happened to be serving at the time they were sent.

Communications relative to foreign affairs were usually referred by Congress to special committees; and May 1, 1777, less than a month

¹² Secret Journals of Congress, ii, 45. They did not perform diplomatic functions at these courts, however.

¹³ Letters of William Lee, i, 195.

¹⁴ Reports of Committees relating to Department of Foreign Affairs, Library of Congress MSS. Paine was dismissed by Congress for making an official matter public. An explanation and a defense of his conduct may be found in Conway's *Life of Paine*, i, 90, *et seq.*

after the foreign affairs committee had been instituted, John Wilson, John Adams, and Richard Henry Lee were selected a committee to inquire into the laws and customs of nations respecting neutrality, and to report their opinion, whether the conduct of the King of Portugal, in forbidding the vessels of the United States to enter his ports, and ordering those already there to depart at a short day is not a breach of the laws of neutrality.

Inquiries of this character, it might reasonably be expected, would fall within the functions of the foreign affairs committee, but rarely did so.

The communications of the committee were usually signed by several of the members; but James Lovell signed them—often “for the committee”—continuously up to the time the committee was superseded by the department of foreign affairs. He was the most active member of the committee and its business was carried on chiefly by him. He was a Boston school-teacher, born in that town October 31, 1737, and graduated from Harvard in 1756. After Bunker Hill battle he was imprisoned by the British, but was exchanged and entered Congress in December, 1776, serving till 1782. In 1779, he was one of the committee that drew up a design for the arms of the United States, but it was rejected. He espoused General Gates's cause against Washington. He is represented as having been a man of unusual learning, but of such eccentricities of manners and speech as to lead at times to a doubt of his sanity.¹⁵

The first public recognition of the independence of the United States by a foreign power was recorded in the treaty of amity and commerce and of alliance eventual and defensive between the United States and France, signed at Paris, February 6, 1778, by Benjamin Franklin, Silas Deane, and Arthur Lee, on the part of the United States and by C. A. Gérard, on the part of France; and following this treaty, in July, 1778, came Gérard, the first representative of a foreign state to the United States. He was styled minister plenipotentiary,¹⁶ and bore a commission also as consul-general.¹⁷

Soon after his arrival, he transmitted to the president of Congress a copy of the speech he intended to deliver at his first audience, and it was referred, with the question of the ceremonies to be observed in

¹⁵ See Austin's *Life of Elbridge Gerry*, i, 336.

¹⁶ *Secret Journals of Congress*, ii, 44.

¹⁷ *Secret Journals of Congress*, ii, 92.

receiving him, to R. H. Lee, Robert Morris, and Witherspoon.¹⁸ They prefaced their report with the following "observations:"

That Ministers being of three different classes, viz: 1. Ambassadors; 2. Ministers Plenipotentiary and Envoys; and 3. Residents, it will be necessary to establish a ceremonial for each according to their respective Dignity. That your Committee report for an Ambassador the following ceremonial, viz:

When he shall arrive within any of the United States he shall receive from any Battery, Fort or Castle the same salute or other Honors which are paid to the Flag of the Prince or State which he shall represent, and when he shall arrive at the Place which the Congress shall be, he shall wait upon the President and deliver his credentials or copies thereof. Three members of Congress shall then be deputed to wait upon him.¹⁹

For a resident minister the committee proposed to omit the honor of escort by three members of Congress and to substitute a master of ceremonies. The other ceremonies were modified in the same proportion.

The consideration of so much of this report as related to ambassadors and resident ministers was postponed as unnecessary at the time. The ceremonies in the case of ministers plenipotentiary were prescribed in the following resolutions which were adopted:

At the time he is to receive his audience, the two members [who are to act as his escort] shall again wait upon him in a coach belonging to the States; and the person first named of the two shall return with the minister plenipotentiary or envoy in the coach, giving the minister the right hand and placing himself on his left, with the other member on the front seat.

When the minister plenipotentiary or envoy is arrived at the door of the Congress hall, he shall be introduced to his chair by the two members, who shall stand at his left hand. Then the member first named shall present and announce him to the President and the house; whereupon he shall bow to the President and the Congress, and they to him. He and the President shall again bow unto each other, and be seated, after which the house shall sit down.

Having spoken and been answered, the minister and President shall bow to each other, at which time the house shall bow, and then he shall be conducted home in the manner in which he was brought to the house.

¹⁸ Reports of Committees relating to Department of Foreign Affairs, Library of Congress MSS.

¹⁹ "Also at all Places where there are guards Centries and the like he shall receive the same military Honors and Respect which are paid to a General officer in the service of the United States of the highest Rank." (Note in original MS.)

Those who shall wait upon the Minister, shall inform him, that, if in any audience he shall choose to speak on matters of business, it will be necessary previously to deliver in writing to the President, what he intends to say at the audience; and if he shall not incline thereto, it will, from the Constitution of Congress, be impracticable for him to receive an immediate answer.

The style of address to Congress shall be "Gentlemen of the Congress."

All speeches or communications in writing may, if the public minister choose it, be in the language of their respective countries. And all replies, or answers, shall be in the language of the United States.

After the audience, the members of Congress shall be first visited by the Minister Plenipotentiary or Envoy.

These ceremonies were followed when the French minister had his first audience, August 6, 1778. The committee of foreign affairs did not participate in the ceremonies as a committee.²⁰ The communications of the French minister were sent direct to the president of Congress, and were considered by the whole Congress after having been reported upon by some special committee. Upon occasion, in the event of some communication of importance, the president of Congress would declare that, in his opinion, it was expedient that the Congress and the minister should confer. The latter would then meet the Congress in committee of the whole, and the result of the interview would be reported to the Congress itself. The minister held the right to be present, however, when foreign affairs were being discussed, and thus became a potent factor in the conclusions reached. His dispatches to his government are in themselves a record of the proceedings of the Congress.

The discussion of negotiating a treaty of peace with Great Britain began in Congress early in the summer of 1779, and August 4, a committee of five was selected "to prepare instructions for the minister plenipotentiary of these United States to be appointed for negotiating a treaty of peace." August 13, Robert Morris, Henry Laurens, Samuel Huntington, John Dickinson, and Thomas McKean, the members chosen, submitted a draft, which was debated paragraph by paragraph and adopted the next day.²¹ This was the method usually

²⁰ Secret Journals of Congress, ii, 94, *et seq.* After the department of foreign affairs had been organized a few unimportant changes were made in these ceremonies. (Reports of Committees relating to Department of Foreign Affairs, Library of Congress MSS.)

²¹ Secret Journals, ii, 275.

pursued in the case of important communications, the foreign affairs committee having no participation in their preparation.

Only occasionally was there any recognition of the committee. October 13, 1779, when the question of the pecuniary allowances for Jay as a commissioner to negotiate a peace was referred to a special committee, it was further "ordered that Mr. Witherspoon and Mr. Lovell, members of the committee for foreign affairs," be added to the special committee²² and on May 19, 1780, Congress having drawn on Franklin and Jay for \$25,000 each, in order to pay the expenses of the government, the foreign affairs committee was instructed, May 31, to inform Franklin and Jay of the drafts.²³ The committee also made a few reports during the ensuing months, but it had no real power and there was a decided opposition in Congress to its acquiring any.

"On the one hand," says Dr. Wharton, "it was maintained that our relations with foreign nationsought to be freed from the artificial shackles which international law had imposed, and that we should approach them with blunt simplicity, demanding not only recognition, but aid. In other words 'militia' diplomatists, to use John Adam's illustration, sometimes gain victories over regular troops, even by departing from the rules."

From Madrid, October 27, 1780, John Jay wrote to Lovell:

I would throw stones, too, with all my heart, if I thought they would hit only the committee without injury to the members of it. Till now I have received but one letter from them, and that not worth a farthing, though it conveyed a draft for one hundred thousand pounds on the bank of hope. One good private correspondent would be worth twenty standing committees, made of the wisest heads in America, for the purpose of intelligence.²⁴

April 23, 1781, he wrote Charles Thomson, the secretary of Congress:

I wish in my heart that you was not only secretary of Congress, but secretary also for foreign affairs. I should then have better sources of intelligence than gazettes and reports.

"There is really," wrote Lovell to Arthur Lee, August 6, 1779, "no such thing as a committee of foreign affairs existing—no secretary or clerk further than I persevere to be one and the other. The books and the papers of that extinguished body lay yet on the table of Congress, or rather are locked up in the secretary's private box. There was a motion,

²² *Ibid.* 312, 313.

²³ *Dip. Cor. Amer. Rev.* i, 289.

²⁴ Correspondence and public papers of John Jay, i, 440.

as I have before told you, to choose a new committee; the house would not so insult *me*. An indifference then took place as to filling the old one, upon presumption. I suppose, that a little leaven would leaven the whole lump."²

That some system must be introduced to take the place of the existing chaos in the machinery of managing the increasing foreign affairs of the country became so apparent that Congress finally took the matter up seriously. In January, 1781, it considered the following "plan for the department of foreign affairs."

That the extent and rising power of these United States entitles them to a place among the great potentates of Europe, while our political and commercial interests point out the propriety of cultivating with them a friendly correspondence and connection.

That to render such an intercourse advantageous, the necessity of a competent knowledge of the interests, views, relations, and systems of these potentates, is obvious.

That a knowledge, in its nature so comprehensive, is only to be acquired by a constant attention to the state of Europe, and an unremitting application to the means of acquiring well-grounded information.

That Congress is, moreover, called upon to maintain with our ministers at foreign courts a regular correspondence, and to keep them fully informed of every circumstance and event which regards the public honour, interest and safety.

That to answer these essential purposes, the committee are of opinion, that a fixed and permanent office for the department of foreign affairs ought forthwith to be established, as a remedy against the fluctuation, the delay and indecision to which the present mode of managing our foreign affairs must be exposed:

Whereupon

Resolved: That an office be forthwith established for the department of foreign affairs, to be kept always in the place where Congress shall reside.

That there shall be a secretary for the despatch of business of the said office, to be styled "secretary for foreign affairs."

That it shall be the duty of the said secretary to keep and preserve all the books and papers belonging to the department of foreign affairs, to receive and report the applications of all foreigners; to correspond with the ministers of the United States at foreign courts, and with the ministers of foreign powers and other persons, for the purpose of obtaining the most extensive and useful information relative to foreign affairs, to be laid before Congress when required; also to transmit such communications as Congress shall direct, to the ministers of these United States

² Reports of Committees relating to Department of Foreign Affairs, Library of Congress MSS.

and others at foreign courts, and in foreign countries; the said secretary shall have liberty to attend Congress, that he may be better informed of the affairs of the United States, and have an opportunity of explaining his reports respecting his department; he shall also be authorized to employ one or if necessary more clerks to assist him in his office; and the secretary as well as such clerks, shall, before the president of Congress take an oath of fidelity to the United States, and an oath for the faithful execution of their respective trusts.²⁶

It was not until August 10, that the new department was organized, when, on motion of William Floyd, of New York, Robert R. Livingston, of New York, was elected secretary.²⁷ He had been a member of the committee of foreign affairs for a brief period in 1779; but he declined the new office, until informed of the extent of his powers. Having been satisfied on this score, he accepted, September 23. Until then Lovell acted for the old committee, his last communication bearing date September 20.²⁸

Upon Livingston devolved the task of forming a new department. He wrote, soon after he took office, to Count Vergennes, informing him of the change.

"Congress," he said, "having thought it expedient to dissolve the committee of their own body, by whom their foreign affairs had hitherto been conducted, and to submit the general direction of them (under their inspection) to a Secretary for Foreign Affairs I do myself the honour to inform Your Excellency that they have been pleased to appoint me to that Department, and to direct me to correspond in that capacity with the Ministers of Foreign Powers."

He also informed Franklin, John Adams, Dana, and Jay, our ministers abroad, as soon as he took office.²⁹ He started record books, and endeavored to give system to the conduct of business; but the functions of his department were ill defined, and Congress continued the custom of appointing special committees to consider diplomatic communications. January 25, 1782, Livingston set forth the difficulties surrounding the administration of the business of his office in a letter to the president of Congress.

He thought it his duty, he said, to call the attention of Congress to

²⁶ Secret Journals of Congress, ii, 580, *et seq.*

²⁷ Secret Journals of Congress, ii, 587.

²⁸ Reports of Committees relating to Department of Foreign Affairs, Library of Congress MSS.

²⁹ Department of State MSS., Letters of Robert R. Livingston.

some things which had been omitted in the scheme of organization of his department which ought to be supplied and others which ought to be omitted. As he was to correspond with American ministers abroad and foreign ministers in the United States, it was necessary that his letters should reflect the sentiment of Congress, which in this country was the sovereign. This he found to be a difficult task, as the sentiments often changed and were often imperfectly expressed. There were occasions, too, when he should properly speak a sentiment which it would be improper for Congress to declare by a public act. It was true that he was permitted to attend the sessions of Congress in order to inform himself and to explain his reports, but he was puzzled to know how to ascertain the sentiments when he attended, as the debates often did not take the turn he wished and left him in ignorance of the only point on which he desired to gain light. He thought that he might shorten debates and gain more information if he might be permitted to ask questions. He did not wish to assume this liberty, unless it was expressly given to him. He was also without power to act upon matters not of sufficient moment to engage the attention of Congress,

as for instance, application for aid in procuring the release of an American taken under particular circumstances in English ships, and confined in the French West Indies or elsewhere, claims upon prizes carried in the French Islands, etc., which cases occur every day and are attended with long Memorials which would take up much of the time and attention of Congress.

He had hitherto transacted this business with the French minister, and the governors and generals of the French islands, but he wished authority from Congress for doing so. He kept a book in which all such applications and the action taken were entered. He presumed that some alteration should be made in matters of form and ceremony, in conformity with the practice of other nations, and also to derive the advantages they sometimes afforded of creating delays, "and concealing for political reasons" the views of Congress. As Congress had given him the power of appointing clerks he had appointed two, who were barely a sufficient number to perform the duties, which were much greater than he had imagined they would be. Five copies beside the draft of every foreign letter or paper transmitted were necessary. To copy all the letters which had already been received, the secret

journals, and the extracts relating to foreign affairs in the files of Congress, which he thought a very necessary work would be impossible without further aid for at least one year. He wished instructions as to the number of clerks he might employ and their salaries. An interpreter was a necessity for his department and the admiralty, and he recommended that one be appointed who could also assist him as a secretary. As it was a delicate matter for him to point out a mode for extending his own powers he refrained from doing so.³⁰

As soon as this letter had been read, Congress appointed Nicholas Everleigh, Edmund Randolph, and William Ellery a committee to confer with Livingston. They made an inventory of the department:

List of books and papers kept in the office of foreign affairs.

BOOKS.

1. Book of Foreign Letters.
2. Book of American Letters.
3. Book of Resolutions of Congress.
4. Journal of daily Transactions.
5. Book of reports made to Congress.
6. Letters of the late Comm. for foreign affairs.
7. A book containing commissions and instructions to the ministers at foreign courts.
8. One more do.
9. A book of the letters of the commissioners in France while Mr. Adams was among them.
10. Communications of Monsr. Gerard.
11. Do. of the Chv. de la Luzerne,)
12. Letters of Mr. J. Adams,) not completed.
13. Letters of Mr. Arthur Lee.)

PAPERS.

- 1st Box.
 1. Joint Letters from the Commrs. of Congress at Paris.
 2. Letters from the Hon B. Franklin.
 3. Letters from the Hon. B. Laurens.
 4. Letters from the Hon. J. Laurens.
 5. Letters from Mr. T. Barclay.
 6. Correspond. betw. Mr. Adams & Count Vergennes.
- 2nd Box.
 1. Letters from Hon. J. Jay.
 2. Letters from the Hon. W. Carmichael.
 3. Letters from Mr. B. Harrison.

³⁰ Department of State MSS., Letters of Robert R. Livingston.

- 3rd Box. 1. Letters from Hon. John Adams.
2. Letters from F. Dana, Esq.
- 4th Box. 1. Letters from Mr. Dumas.
2. Letters from Mr. J. De Neuville.
- 5th Box. Letters from Messrs. Deane, Izard &c.
- 6th Box. Letters from Messrs. Bingham, Parsons &c.
- 7th Box. Letters, notes, memorials and communications to the
Chv. de la Luzerne.
- 8th Box. Original papers relative to complaints referred to the
office of foreign affairs.
- 9th Box. Miscellaneous letters & papers

On their report it was

Resolved, That the department of foreign affairs be under the direction of such officer as the United States in Congress assembled have already for that purpose appointed, or shall hereafter appoint, who shall be styled "Secretary to the United States of America for the Department of Foreign Affairs," shall reside where Congress or the Committee of the States shall sit, and hold his office during the pleasure of Congress.

That the books, records and other papers of the United States that relate to this department, be committed to his custody, to which, and all other papers of his office, any member of Congress shall have access; provided that no copy shall be taken of matters of a secret nature without the special leave of Congress.

That the correspondence and communications with the ministers, consuls and agents of the United States in foreign countries and with the ministers and other officers of foreign powers with Congress, be carried on through the office of foreign affairs by the said secretary, who is also empowered to correspond with all other persons from whom he may expect to receive useful information relative to his department; provided always, that letters to ministers of the United States, or ministers of foreign powers, which have a direct reference to treaties or conventions proposed to be entered into, or instructions relative thereto, or other great national subjects, shall be submitted to the inspection and receive the approbation of Congress before they shall be transmitted.

That the secretary for the department of foreign affairs correspond with the governors or presidents of all or any of the United States, affording them such information from his department as may be useful to their states or to the United States, stating complaints that may have been urged against the government of any of the said states, or the subjects thereof, by the subjects of foreign powers, so that justice may be done agreeably to the laws of such state, or the charge proved to be groundless, and the honour of the government vindicated. He shall receive the applications of all foreigners relative to his department, which are designed to be submitted to Congress, and advise the mode in which the memorials and evidence shall be stated, in order to afford Congress the most comprehensive view of the subject; and if he conceives it necessary, accompany such memorial with his report thereon. He may concert measures with the ministers or officers of foreign powers

amicably to procure the redress of private injuries, which any citizen of the United States may have received from a foreign power, or the subjects thereof, making minutes of all his transactions relative thereto and entering the letters at large which have passed on such occasions. He shall report on all cases expressly referred to him for that purpose by Congress, and all others touching his department, in which he may conceive it necessary. And that he may acquire that intimate knowledge of the sentiments of Congress which is necessary for his direction, he may at all times attend upon Congress; and shall particularly attend when summoned or ordered by the President. He may give information to Congress respecting his department, explain and answer objections to questions to his reports when under consideration, if required by a member, and no objection be made by Congress. He shall answer to such inquiries respecting his department as may be put from the Chair by order of Congress, and to questions stated in writing about matters of fact which lie within his knowledge, when put by the President at the request of a member, and not disapproved of by Congress. The answers to such questions may, at the option of the secretary, be delivered by him in writing. He shall have free access to the papers and records of the United States in the custody of their secretary, or in the offices of finance and war or elsewhere. He may be furnished with copies or take extracts therefrom, when he shall find it necessary. He shall use means to obtain from the ministers and agents of the said United States in foreign countries an abstract of their present state, their commerce, finances, naval and military strength, and the characters of sovereigns and ministers, and every other political information which may be useful to the United States. All letters to sovereign powers, letters of credence, plans of treaties, conventions, manifestoes, instructions, passports, safe-conducts and other acts of Congress relative to the department of foreign affairs, when the substance thereof shall have been previously agreed to in Congress, shall be reduced to form in the office of foreign affairs, and submitted to the opinion of Congress; and when passed, signed and attested, sent to the office of foreign affairs to be countersigned and forwarded. If an original paper is of such a nature as cannot be safely transmitted without cyphers, a copy in cyphers, signed by the secretary for the department of foreign affairs, shall be considered authentick, and the ministers of the United States at foreign courts may govern themselves thereby in the like manner as if the originals had been transmitted. And for the better execution of the duties hereby assigned him, he is authorized to appoint a secretary and one, or if necessary, more clerks, to assist him in the business of his office.

Resolved, That the salaries annexed to this Department shall be as follows:

To the secretary of the United States for the department of foreign affairs, the sum of four thousand dollars per annum, exclusive of office expenses to commence from the first day of October last.

To the secretary, one thousand dollars per annum.

To the clerks, each five hundred dollars per annum.

Resolved, That the secretary for the department of foreign affairs, and

each of the persons employed under him, shall take an oath before a judge of the state where Congress shall sit, for the faithful discharge of their respective trusts, and an oath of fidelity to the United States, before they enter upon office.

Resolved, That the act of the 10th of January, 1781, respecting the department of foreign affairs, be and hereby is repealed.²¹

These resolutions, which embodied remedies for the difficulties Livingston had pointed out in his letter, were passed February 22, 1782, and modified March 1, so as to allow the appointment of two under secretaries at a salary of \$800 and \$700 per annum, respectively, instead of a secretary and clerk.

Communications from our ministers abroad now regularly came to Livingston, and were by him submitted to Congress, and the replies were sent through him. The French minister, however, communicated occasionally directly with Congress.

The condition in which our missions abroad were during Livingston's administration was indicated by him in a letter to which he sent to Congress May 8, 1782. As to the method of living of the ministers, he reported that Dr. Franklin had a part of Mr. Chaumont's house at Passy, kept a chariot and pair and three or four servants, and gave a dinner occasionally "to the Americans and others." "His whole expense," Livingston added, "as far as I can learn, is very much within his income." Mr. Adams lived in lodgings, kept a chariot and pair and two men servants. He also had a private secretary who, it was presumed, would be paid by Congress. He had heard that Adams was about to rent a house. Mr. Dana's salary, even in Russia, where the relative value of money was so high that a house could not be hired for less than fifteen guineas a year, was ample. He was not informed of Mr. Jay's manner of living, but he concluded that if he maintained the same style as Dr. Franklin or Mr. Adams and followed the Spanish court which sat in different parts of the kingdom, his expenses must amount to double those of Franklin and Adams. The cost of living, taking Philadelphia as a standard, was twenty per cent cheaper in Paris, if wine, clothing and the wages of servants were included; in Amsterdam it was ten per cent cheaper than in Philadelphia, and in Madrid somewhat higher. In the last named place, the unsettled state of those who followed the court greatly enhanced their expenses. He recommended

²¹ Secret Journals of Congress, iii, 93.

that Mr. Carmichael, then secretary to Jay at Madrid, be appointed "secretary to the embassy from the United States to the court of Versailles" at a salary of \$4000 a year, and that Jay be empowered to employ a private secretary at \$1000 a year, the same privilege being given to Mr. Laurens, "when he enters upon his mission to the United Provinces of the Low Countries." "The commissioners for negotiating a peace, in case Mr. Dana shall not return," he recommended should be authorized to appoint a secretary to the commission at \$1000 a year. The commission of minister plenipotentiary to Russia should be revoked and Francis Dana should be appointed resident at that court. When he should be received in that character he might appoint a private secretary at \$800 a year. No secretary to any of the missions to the "northern courts" should receive more than \$1000, and the salaries of the secretaries to France, Spain and Holland should not exceed \$2000, except in the cases of those who had already been appointed. After January 1, the salary of a minister plenipotentiary from the United States should not exceed \$5000, and that of a resident \$3000, but an allowance for household expenses should be made. He gave the total annual expense of the department of foreign affairs, "exclusive of contingencies," as follows:

Secretary of the United States for the department of foreign affairs,		\$4000
1st under secretary, Lewis R. Morris,		800
2nd under secretary, Peter S. Du Ponceau,		700
Clerk, the Rev. Mr. Tetard,		500
		<hr/>
		\$6,000
Doctor Franklin	2500 at 4s. 6d.	11,111 $\frac{1}{2}$ $\frac{0}{10}$
Mr. Jay	2500 at 4s. 6d.	11,111 $\frac{1}{2}$ $\frac{0}{10}$
Mr. Adams	2500	11,111 $\frac{1}{2}$ $\frac{0}{10}$
Mr. Laurens	1500	6,666 $\frac{2}{3}$ $\frac{0}{10}$
Mr. Carmichael	1000	4,444 $\frac{1}{3}$ $\frac{0}{10}$
Mr. Dana	1000	4,444 $\frac{1}{3}$ $\frac{0}{10}$
Mr. Dumas	200 louis d'ors	920
Consul		1,500
		<hr/>
		57,308 $\frac{8}{9}$ $\frac{0}{10}$
Private secretary to Dr. Franklin,		
Private secretary to Mr. Adams. ²²		

²² Secret Journals of Congress iii, 128, *et seq.*

Madison, Izard, Witherspoon, and Clymer were appointed a committee to inquire into the proceedings of the department. Lovell, also, was appointed, but left Congress before the report was completed. The committee reported September 18, 1782, that, from the time of the institution of the department, in October, 1781, up to July 5, 1782, the secretary for foreign affairs had sent fourteen letters to the minister plenipotentiary at Versailles, ten to the minister plenipotentiary at Madrid, eight to the minister plenipotentiary at the Hague, five to the minister plenipotentiary at St. Petersburg, two to the secretary of legation at Madrid, to our consul in France four letters, five to our agent at Habana, one to Mr. Dumas, one to Messrs. de Neuville & Son, three to Mr. Harrison at Cadiz, one to Samuel Parsons at Martinique, and thirteen to the French minister. The department had also corresponded with the governors and presidents of the States, requesting authentic statements of damages sustained from the enemy, sending circulars containing information touching the progress of our foreign intercourse and similar information. Altogether there had been but eight of these communications. The report closed as follows:

Upon the whole the committee report that the business of this Department appears to have been conducted with much industry, attention and utility; and without any errors or defects worthy of being taken notice of to Congress. Such improvements and alterations in the general plan of the business as were judged by the committee proper they have taken the liberty of suggesting to the Secretary in the course of their inquiry. As far as their suggestions can be of use, the committee have no doubt that they will be attended to.²³

December 3, 1782, Livingston announced his intention of retiring from office, but consented to remain until May following, and did, in fact, serve until June 4, when he took his departure for New York. He gave as his reasons for resigning that he had been elected to an important office in the State of New York (the chancellorship), and that he could not in justice to himself, sacrifice such a portion of his private fortune as was absolutely necessary to support his office.

There may have been other reasons back of Livingston's resignation. The practice of Congress toward his department, as Madison wrote Monroe March 21, 1785,

²³ Reports of Committees relating to Department of Foreign Affairs, Library of Congress MSS.

was never fixed and frequently improper, and I always suspected that his [Livingston's] indifference to the place resulted, in part at least, from the mortifications to which this unsteadiness subjected him.³⁴

But, in spite of the obstacles in his way, Livingston's services had been of the highest order and it is not going too far to say that no one man in the home government deserves equal credit with him for the successful diplomacy of the American Revolution. On the day that he gave up his office Congress

Resolved unanimously, That the thanks of Congress be presented to Mr. Livingston for his services during his continuance in office, and that he be assured, Congress entertains a high sense of the ability, zeal and fidelity, with which he hath discharged the important trust reposed in him.³⁵

Dr. Francis Wharton in the *Diplomatic Correspondence of the American Revolution*, gives the following estimate of Livingston:³⁶

Livingston, though a much younger man than Franklin, possessed, in his dispassionateness and his many-sidedness, not a few of Franklin's characteristics. From his prior administrative experience as royalist recorder of New York he had at least some acquaintance with practical government in America; his thorough studies as scholar and jurist gave him a knowledge of administrative politics in other spheres. As secretary of foreign affairs in 1781-1783, he did more than any one in the home government in shaping its foreign policy. But the system he indicated was, as will be seen, not the 'militia' system of unsophisticated impulse, but that which the law of nations had at the time sanctioned as the best mode of conducting international affairs. His course as secretary was based on the law of nations as thus understood by him. * * * It may be here added that while adhering to the "constructive" or merely "expulsive" or "liberative," he belonged to the liberal wing of constructionism. He wanted, it is true, not simply to abolish the British system, but to establish a better system in its place. But the new system he strove for, and which he was instrumental in introducing, was to be a system of liberalism, construing the Constitution of the United States, which he advocated, on all doubtful points in favor of that view which leaves to government only such power as the people can not exercise for themselves.

Previous to his departure Livingston submitted to Congress a report showing all the officers serving under him, with their salaries.

The "secretary of the United States for foreign affairs" received

³⁴ Writings (Hunt), i, 141.

³⁵ Secret Journals, iii, 363.

³⁶ i, 594, *et seq.*

a salary of \$4000 per annum. Benjamin Franklin, "minister plenipotentiary of the United States at the court of Versailles, and minister plenipotentiary for negotiating a peace;" John Adams, "minister plenipotentiary at the Hague and for negotiating a peace;" John Jay, minister plenipotentiary at Madrid and for negotiating a peace; Henry Laurens, minister plenipotentiary for negotiating a peace; and Thomas Jefferson, with the same rank, each received a salary of \$11,111 per annum. William Carmichael, "secretary to the embassy at the court of Madrid," and Francis Dana, minister of the United States at the court of St. Petersburg, each received \$4444.40 per annum. Charles W. F. Dumas, "agent of the United States at the Hague," received \$920; William Temple Franklin, "secretary to the Honorable Benjamin Franklin," \$1300; Lewis R. Morris, "first under-secretary in the office for foreign affairs," \$800; Peter L. Du Ponceau, "second under-secretary in the office for foreign affairs," \$700; John P. Tetard, "clerk and interpreter of the French language," \$500; Walter Stone, "clerk," \$500; making a total of \$73,244.

How arduous had been the routine business of the department of foreign affairs during the Revolution was set forth in Livingston's letter of January 25, 1782,²⁷ where he stated that five copies of every document sent abroad had to be made. Sometimes as many as seven copies were sent, to lessen the chances of capture or loss, and upon each packet was written the warning, "to be sunk in case of danger from the enemy." As letters were opened upon reaching the post offices in Europe it was deemed necessary to send important instructions by special despatch agents. Cyphers were freely used and Deane sent many letters in an invisible ink which Jay, who was then on the secret committee, brought out by the aid of an acid. A large number of the letters from Congress were captured and went to the British foreign office, where the cypher was probably understood.²⁸

The same session of Congress which extended the vote of thanks to Livingston, ordered the secretary of Congress, Charles Thomson, to take into his care all the papers of the department of foreign affairs until a successor to Livingston should be appointed, and named the next Wednesday for the election, but on that day the election was post-

²⁷ *Supra*, p. 876.

²⁸ *Dip. Cor. Am. Rev.* (Wharton), i, 462.

poned. On August 19, a resolution was introduced to the effect that it was highly important that a secretary for foreign affairs be appointed, and that pending such action the papers of the office be so disposed of temporarily that the members of Congress might have access to them.³⁹ When Livingston left, his under-secretary and personal friend, Lewis R. Morris, was put in charge of the department's business, but he was without authority to act, and soon severed his connection with the office. On March 2, 1784, Henry Remsen, Jr., was elected under-secretary and put in charge of the papers.⁴⁰ As a matter of fact, however, the functions of the department were suspended from the time Livingston left until his successor arrived, our foreign relations being managed wholly by Congress, upon reports of special committees. It had been the duty of the secretary for foreign affairs to introduce every foreign minister upon his being admitted to his first audience with the Congress,⁴¹ and P. J. Van Berekel arriving during the interregnum as minister plenipotentiary from the United Netherlands, Congress ordered, October 25, 1783, that the superintendent of finance and secretary of war, or either of them, perform the ceremonial duties usually assigned to the secretary for foreign affairs.⁴²

Notice having been received from Franklin that Jay intended leaving France for America in April, 1784, Gerry nominated him in Congress May 7, 1784, for secretary of foreign affairs, and he was elected. He took the oath of office and entered on his duties September 21, 1784. Remsen was continued as under-secretary; but Jay deemed the arrangement of one secretary and clerks advisable, and he was given authority to return to that plan.⁴³

Jay had hardly taken control before he wrote to the president of Congress (January 23, 1785):

I have some reason, Sir, to apprehend that I have come into the office of Secretary for foreign affairs with Ideas of its Duties & Rights somewhat different from those which seem to be entertained by Congress.⁴⁴

He accordingly asked for instructions, and the duties of the depart-

³⁹ Secret Journals iii, 363, 364.

⁴⁰ *Ibid.*, iii, 450.

⁴¹ *Ibid.*, iii, 364, *et seq.*

⁴² *Ibid.*, iii, 407.

⁴³ *Ibid.*, iii, 483.

⁴⁴ Department State MSS., American Letters, vol. i.

ment were defined by Congress. It was resolved, February, 11, 1785, that:

In pursuance of the resolutions of the 22d of February 1782, all communications to as well as from the United States in Congress assembled on the subject of foreign affairs, be made through the Secretary for the department of foreign affairs; and that all letters, memorials or other papers on the subject of foreign affairs, for the United States in Congress assembled, be addressed to him.

Resolved, That all papers written in a foreign language, which may in future be communicated to Congress from the office of the department of foreign affairs, shall be accompanied with a translation into English.

Resolved, That the Secretary for the department of foreign affairs be and he is hereby authorized, to appoint an interpreter, whose duty it shall be to translate all such papers as may be referred to him, as well by the United States in Congress assembled as by Committees of Congress, the secretary for the department of foreign affairs, the secretary of Congress, the board of treasury, or the secretary for the department of war; and who shall be entitled to receive such allowance as the secretary for foreign affairs may think sufficient, not to exceed the annual pay of a clerk in the office; and who, previous to his entering on his duty as interpreter, shall take the oath of fidelity, and the oath of office, prescribed in an ordinance passed on the 27th day of January last, a registry of which oaths shall be kept in the office of the secretary of Congress.^a

On this subject Madison wrote to Monroe, March 21, 1785:

If the office of foreign affairs be a proper one, and properly filled, a reference of all foreign despatches to it in the first instance is so obvious a course, that any other disposition of them by Congress seems to condemn their own establishment, to affront the minister in office, and to put on him a label of caution against that respect and confidence of the ministers of foreign powers which are essential to his usefulness. I have always conceived the several ministerial departments of Congress to be provisions for aiding their counsels as well as executing their resolutions, and that consequently whilst they retain the right of rejecting the advice which may come from either of them, they ought not to renounce the opportunity of making use of it. The foreign department is, I am sensible, in several respects the most difficult to be regulated, but I cannot think the question arising on Mr. Jay's letter is to be numbered among the difficulties.^a

The negotiations of treaties with foreign powers had not thus far been done in the United States, but by our ministers abroad, under instructions from Congress. Their ratification by Congress was announced by proclamation, the approval of the representatives of at

^a Secret Journals, iii, 527.

^a Writings (Hunt), i, 141.

least nine states being necessary under the confederation. But Jay was called upon to conduct negotiations with the Spanish minister looking to a treaty with that power, involving the vital question of the right to the navigation of the Mississippi. The insufficiency of his powers prompted him to address Congress, May 29, 1786, and ask whether it would not be advisable to appoint a committee with power to instruct him "on every point and subject relative to the proposed treaty."⁴⁷ With this request Congress refused to comply. He was given, August 29, power "to treat, adjust, conclude and sign with Don Diego de Gardogui" a boundary treaty or convention, but was charged to inform Congress what propositions were made to him before he agreed to any of them.⁴⁸

The Constitution of the United States had been adopted and elections under it were in progress for the new Congress, when the last Congress under the old confederation appointed, August 14, 1788, a committee composed of Messrs. Otis, L'Hommedieu, Reed, Tucker, and Brown to report on the condition in which the department of foreign affairs then was. They found that it occupied two rooms, one being the secretary's and the other that of his deputy and clerks. The daily transactions were entered in a minute book as they occurred and from these copied into a journal, which contained all the transactions of the department. At present it occupied two folio volumes. The secretary's letters to agents abroad were recorded in a book entitled Book of Foreign Letters, such parts as required secrecy being in cypher. The correspondence with foreign ministers and others in the United States were recorded in the American Letter Book, and comprised three folio volumes. Reports to Congress were recorded in a Book of Reports, the third volume of which was then in hand. The negotiations with Spain were recorded in a separate book. Passports for vessels issued under the act of Congress of February 12, 1788, with evidence accompanying the applications were recorded in a book kept for the purpose. Letters of credence and commissions of foreign ministers, charge d'affaires and consuls were recorded in the Book of Foreign Commissions. There was also a Book of Accounts showing the expenses of the office and one in which were entered all acts of Congress

⁴⁷ Secret Journals, iv, 43

⁴⁸ *Ibid.*, iii, 508, 570.

relating to the department. The business of the office was conducted by the secretary's deputy and two clerks who gave such time as they could to the recording of previous correspondence. They had already recorded one volume of Dana's letters during his mission to Russia, beginning February 18, 1780, and ending December 17, 1783; of H. Laurens beginning January 24, 1780, and ending April 30, 1784; of J. Laurens during his special mission at Versailles from January 3, and ending September 6, 1781. There were five volumes of Adams' letters from December 23, 1777, to April 10, 1787, and work was in progress on the sixth volume. Two volumes contained Jay's letters from December 20, 1779, to July 25, 1784. Deane's letters from September 17, 1776, to March 17, 1782, were recorded, and those from Arthur Lee from February 13, 1776, to February 13, 1778, were in hand. The letters from Franklin, Jefferson, the first joint commissioners and the joint commissioners for negotiating a treaty of peace, and those for negotiating treaties of commerce, William Lee, Dumas and others were numerous, and were not yet recorded. "The letter book of the late committee for foreign affairs composed of sheets stitched together and much worn" had been copied in a bound book and indexed. There was an index to the paper cases and to the boxes in each case, and to the papers in each box, the original letters and papers being in the cases and boxes. The office was constantly open from nine o'clock in the morning till six in the evening, and one clerk remained in the office while the others went to dinner. The report concluded: "And upon the whole they find neatness, method and perspicacity throughout the department"⁴⁹

This was the last report made upon the condition of the department of foreign affairs. The last act relative to foreign affairs was taken by the expiring Congress, September 16, 1788, when, on a report from a committee composed of Hamilton, Madison, Dane and Edwards it was:

Resolved, That no further progress be made in the negotiations with Spain, by the secretary for foreign affairs, but that the subject to which they relate be referred to the federal government, which is to assemble in March next.⁵⁰

⁴⁹ Reports of Committees relating to Department of Foreign Affairs, Library of Congress MSS.

⁵⁰ Secret Journals, iv. 452.

One month later the Congress of the confederation was dead, not a sufficient number of members attending to form a quorum.

The only two secretaries of foreign affairs before the Constitution went into effect were Livingston and Jay. Both showed conspicuous ability, and it is doubtful if men better equipped for the office they held could have been found in America. The diplomacy of the Revolution was, on the whole, splendidly successful, but this was due chiefly to the energy and genius of the American diplomatists, for the machinery which they were obliged to use was weak and inadequate for its purpose. In no branch of governmental affairs was the necessity for a stronger government and closer union of the states more crying than in our foreign relations, and this was more evident after the peace than it was while the states clung together in the common danger of war.

"When our ministers and agents in Europe," says John Fiske, "raised the question as to making commercial treaties, they were disdainfully asked whether European powers were expected to deal with thirteen governments or with one. If it was answered that the United States constituted a single government so far as their relations with foreign powers were concerned, then we were forthwith twitted with our failure to keep our engagements with England with regard to the loyalists and the collection of private debts. 'Yes, we see,' said the European diplomats; 'the United States are one nation to-day and thirteen to-morrow, according as may seem to subserve their selfish interests.' Jefferson, at Paris, was told again and again that it was useless for the French government to enter into any agreement with the United States, as there was no certainty that it would be fulfilled on our part, and the same things were said all over Europe."⁴¹

GAILLARD HUNT.

⁴¹The Critical Period of American History. p. 160 (3d edition).

THE AMERICAN CONSULAR SERVICE

The consular service of the United States has been for a long time the object of a great deal of criticism, some of which unfortunately has been well founded but much has been due to imperfect acquaintance with the legitimate functions of consuls and, therefore, to lack of ability to judge accurately of their shortcomings. It is of interest to note that of recent years the criticism has been for the most part confined to our own country, while from the people of other nations our consuls have received unstinted praise for their activity and efficiency, and our system has been frequently held up abroad as a model after which to reorganize some of the older European systems the virtues of which it has been the custom of our people to extol. But while it is true that in many respects our consuls have shown themselves the equals if not the superiors of the consuls of other nations, the fact remains that our service has been uneven in point of efficiency; there has been no satisfactory organization; little care has been exercised in the selection of persons for appointment; and the salaries and equipment have been far from adequate. Repeated attempts to correct these defects have been made during a period dating almost from the beginning of the government, but, with the exception of the improvements made in 1856, all these attempts have failed largely because they lacked the support of any considerable public sentiment.

The great majority of our people have been so busily engaged in the development of the immense resources of the country that until recently they have had little occasion to interest themselves in the character or usefulness of our representatives abroad. But the growth of our foreign commerce and the closer relations which our people enjoy with the peoples of other nations have given rise to a demand for a better consular service in response to which a law was passed last year making possible for the first time the organization of the consular system in a manner calculated to develop its efficiency and usefulness. The importance of that law can be more fully appreciated after a brief account of the condition of the consular service in the past and of the efforts made to improve it.

By the treaty of amity and commerce concluded with France on the sixth of February, 1778, the United States first formally recognized the right of consular representation. That treaty granted mutually the right of each nation to appoint in the ports of the other consuls, vice consuls, agents and commissaries and stipulated that their functions should be regulated by a particular agreement to be negotiated later. Unlike France, the United States did not at once take advantage of the rights conceded by the treaty, and continued to rely upon its political and commercial agents abroad for the performance of consular functions in case of need. The necessity for some officer to perform these functions had become apparent as early as 1776 when Silas Deane and Thomas Morris, who had been sent to France to represent the colonies as political and commercial agents, found that they were not infrequently called upon to care for American seamen and vessels. After the arrival in Paris of Benjamin Franklin and Arthur Lee, who undertook with Deane, the negotiation of the treaty of commerce, the purely consular duties, in addition to the purchase of supplies and the promotion of commerce, became so burdensome that they interfered seriously with the satisfactory discharge of the more important diplomatic work with which the commissioners were charged. Early in 1778 complaints from the commissioners began to reach congress, and in May of that year John Adams, who had been elected a commissioner in place of Deane and had arrived in France in April, criticised severely the system of combining the business of a public minister with that of a commercial agent. In July the commissioners unanimously recommended to congress the appointment of consuls, and the following year Franklin wrote:

We have long since written to congress advising and requesting that consuls might be appointed, and we have expected every day for some months intelligence of such appointments. (3 Wharton: Diplomatic Correspondence, p. 35.)

and again:

Commercial agents . . . and the captains are continually writing for my opinion or orders or leave to do this or that, by which much time is lost to them and much of mine taken up to little purpose from my ignorance. (3 Wharton: Diplomatic Correspondence, p. 191.)

Other agents wrote to like effect, but congress does not appear to have made any effort to relieve the commissioners of their commercial func-

tions until November 4, 1780, when it elected Colonel William Palfrey, paymaster general of the continental armies, the first consul of the United States. Colonel Palfrey was to reside in France and was to receive a salary of \$1500 a year in lieu of the usual commissions for business done on account of the United States. His functions were to be similar to those of a consul general and he was to have supervision of all fiscal matters of the United States in France. Unfortunately his ship was lost in a storm, and uncertain of what may have been his fate, congress resolved January 21, 1781, that Thomas Barclay be appointed a vice consul to exercise "all the powers and perform the services required of William Palfrey." The vice consul was to be allowed a salary of \$1000 a year in lieu of all commissions.

While by the treaty with France it had been agreed to receive and send consuls, there was nothing in any treaty or act of congress outlining their rights and duties, and inasmuch as France had promptly sent consuls to American ports, the extent of consular authority had become an important question. On February 23, 1779, the council of Massachusetts Bay asked congress to define the powers which might be exercised by foreign consuls in American ports, and a special committee was appointed to confer with M. Gérard, the French minister. That officer took advantage of the opportunity to present to congress an outline of a convention based upon the section in relation to consuls in the treaty of 1778. In an accompanying memorial he set forth the difficulties experienced by foreign consuls in exercising their functions under the state governments which still retained within their control the legislative and administrative regulation, of foreign commerce, and many of the judicial powers which were later vested in the federal government. He also made clear the desire of France to secure a larger share of the trade of America than it then possessed.

Little progress was made, however, until July, 1781, when Luzerne, who had succeeded Gérard as minister, again brought the subject to the attention of congress. (4 Wharton: Diplomatic Correspondence, p. 604.) In January of the following year a plan for a consular convention was adopted and forwarded to Franklin in Paris, with instructions granting him much discretion as to the form in which it might be agreed upon, but directing him especially to insist upon the substance of it. Franklin clearly disregarded the wishes of congress

and permitted the French negotiator to modify the plan in several important particulars before the convention was finally signed on July 29, 1784.

Although congress had changed its opinion as to the desirability of concluding a consular convention, and had even forwarded instructions to Franklin to delay signing, the convention when received was referred to Jay, then minister for foreign affairs, for examination. It was found to be objectionable in several respects in that it was not only not in accord with the plan agreed upon by congress, but gave to consuls jurisdiction over the vessels of their respective nations which would enable them to arrest and return to the home country any vessel, master or seaman, to regulate emigration, and to exercise powers of a judicial nature which belonged properly to the courts. Personally Jay was unfavorable to a consular convention, but in the circumstances he recommended the negotiation of a new treaty which, after much delay, was signed on November 14, 1788, by Jefferson, who had succeeded Franklin as minister. The convention was unanimously ratified by the senate the following year.

Jefferson returned to the United States and assumed the duties of secretary of state on March 22, 1790, and upon him fell the task of organizing a consular system. His work was attended by many practical difficulties. Although congress had for several years recognized the need of consular officers and provision for their appointment had been made by the constitution which had been lately adopted, there was no law or regulation which in any way outlined a consular system or set forth the nature of consular duties. Even the policy of providing salaries for consuls inaugurated when Palfrey and Barclay had been elected to serve in France, had been abandoned by the resolution of 1785, which, in opposition to the repeated protests of Franklin and Adams, had combined the diplomatic and consular services by conferring the title of consul general upon ministers and *chargés d'affaires*. The lack of any consistent policy on the part of congress was shown three months later when a consul was named for Canton, China, who was to serve without salary.

It was in this condition with no fixed method of appointment or compensation that Jefferson found the consular system when he assumed the direction of our foreign relations. The requirements of our commerce and shipping made it desirable to increase the number

of consuls without waiting for the enactment of laws, and in less than three months after Jefferson became secretary of state eight persons were appointed to consular offices, and by the latter part of August, 1790, sixteen consular officers, six consuls and ten vice consuls had been appointed. They were to receive no compensation, but were permitted to engage in trade.

Jefferson undertook to define their duties in his circular of August 26, 1790 (State Department, Foreign Letters, p. 399), addressed to the consuls and vice consuls of the United States. He directed them to report to him every six months in detail concerning American vessels that may have entered or cleared from their respective ports; to supply him from time to time with political and commercial information of interest to the United States; and to report upon all military preparations that might take place in their ports, and should war appear imminent, to notify American merchants and vessels in order that they might be on their guard. Consuls were authorized to appoint agents to represent them in the several parts of their districts.

At the beginning of the next session of congress, the president asked the attention of that body to the consular convention with France and the necessity for legislation to carry its stipulations into effect, and also to the importance of providing regulations for the exercise of consular jurisdiction, whether permitted by treaty or by friendly indulgence. Although a bill for the purpose indicated in the president's address had been pending in congress, the short session passed without anything being done, and it was not until April 14, 1792 (1 Statutes at Large, p. 256), that a law was enacted. This law, primarily for the purpose of carrying into effect the consular convention with France, was the first legislative attempt to define the powers and duties of consular officers. It authorized them to receive protests and declarations of captains, masters, crews, passengers and merchants who might be American citizens; to authenticate copies of documents; to take charge of and settle the estates of American citizens dying abroad and leaving no legal representative; to care for American vessels that might become stranded on the coasts of their consulates; to receive certain fees for authenticating documents and settling estates; to relieve distressed American seamen, and to require masters of American vessels under penalty of a fine to convey such seamen to their homes without charge on condition that the seamen should work

during the passage; and to require the master of a vessel sold in a foreign port to provide for the return of the seamen thereon. The act also required consuls to give bond for the faithful discharge of their duties and obligations; permitted the payment of salaries of \$2000 each to consuls in the Barbary States in case it should become necessary to appoint them; and authorized consuls to exercise such additional powers as might result from the nature of the office or from any treaty or convention under which they might act.

The duties of consuls in relation to seamen and vessels were enlarged by the act of February 28, 1803, and later acts, and the additional duty of administering oaths to exporters of merchandise upon which an *ad valorem* duty was collected in American ports was added by the act of March 1, 1823, but the act of 1792 continued for more than half a century to be the only law of importance in relation to consular officers.

While congress had failed to make provision for anything in the nature of a consular system, Jefferson before his retirement had established general rules in accordance with which appointments were made and consular business conducted. In harmony with the views long before expressed by Franklin, Adams, Jay and himself, he adopted the principle that none but American citizens should represent the United States as consuls. If it was found that no American citizen was available at a port where it was desirable to appoint a consular officer, a reputable foreign subject was chosen and made vice consul. As with the exception of consulates in the Barbary States no salaries were provided for these offices, the Americans available for appointment were as a rule engaged in mercantile or other pursuits.

In the appointment of merchant consuls, the United States had merely followed the practice of some of the continental nations, and was forced to contend with conditions much less favorable than those with which the older European nations had to deal. By reason of long continued foreign intercourse, many subjects of those nations resided in foreign ports, were well established in trade, and were men of influence and responsibility. Commercial interests suffered little when confided to their care, and official remuneration bore a less important relation to their usefulness as consular representatives. But it was different with the United States. The nation was new and our people had few prosperous commercial houses permanently estab-

lished abroad. The government was therefore unable for the most part to select from among its citizens in the various foreign ports persons whose circumstances enabled them to hold the office of consul and to discharge the duties in an efficient and satisfactory manner for the slender and uncertain emoluments derived from fees. A large majority of the persons appointed desired the office of consul for their own personal benefit. When an American citizen undertook to establish himself abroad in some commercial occupation in a port where the United States was not represented by a consular officer, it was usual for him to seek the prestige with the consequent aid to his business enterprises which his appointment as consul would afford. With the help of influential friends, whose solicitations it was not easy to resist, he was generally able to bring about his appointment. It was not unnatural that in many cases men so appointed should have regarded the office primarily as an aid in building up a profitable business often at the expense of other merchants in the port over whom the office of consul gave them undue advantage. Not infrequently their business ventures proved unsuccessful, and the emoluments of the consular office far below what they were led to expect. Alone in a foreign land amid such difficulties as these it is not strange that some of them were forced to resort to means of eking out a livelihood which injured and frequently destroyed their official usefulness.

The growth of the trade and the development of the commercial intercourse of the United States with foreign countries were accompanied by new duties and responsibilities for consular officers. In its desire to promote the interests of shipping, congress was gradually enlarging consular jurisdiction over shipmasters and seamen, and in conferring these additional powers, without at the same time providing more effective means of exercising control over consuls, great opportunity for misconduct was afforded. Moreover, there was no uniform rule as to the manner in which these services were to be performed or the fees that should be charged for them. Some consuls charged one fee and some another, and the fact that the fees belonged to the officers collecting them gave encouragement to the growing practice of charging as large a fee as could without too great difficulty be collected and led to endless controversies with masters of vessels and citizens in foreign ports.

The unsatisfactory conditions impressed those in authority with the necessity for a law to place the consular service upon a more dignified basis and make it reasonably amenable to administrative control.

The early advocates of reform directed their efforts toward the accomplishment of three things: (1) a revision and extension of the schedule of fees; (2) a more precise definition of the duties and powers of consuls; and (3) the substitution of salaries for the unsatisfactory and inadequate compensation derived from fees.

As early as 1816 a fruitless effort had been made by the secretary of state to have fixed salaries for at least the more important consuls, but it fell to the lot of Mr. Van Buren, secretary of state in 1830, to begin the series of reform movements which were to continue for so many years and finally result in the enactment of the general law of 1856. On February 10, 1830 (Senate Report No. 57, 21st cong., 2d session), and again the following year he called attention of the senate committee on commerce to the necessity of at least defining the fees to be collected by consuls. He described existing practices which he said produced great inconvenience and embarrassment to consuls, led to unpleasant collisions between them and their fellow citizens and to endless criminations and recriminations on both sides which tended to injure the national character of the United States in the estimation of foreigners, and to bring the consular system into disrepute. Before preparing his recommendations Mr. Van Buren had obtained reports from many of the consuls, and with his communication of February 1, 1831 (Senate Report No. 57, 21st cong., 2d session), he transmitted a report from Daniel Strobel, then consul at Bordeaux, who compared the American system with the systems adopted by foreign nations, and pointed out that Great Britain, France, Spain, Portugal and Russia, at that time the principal commercial nations, had succeeded in greatly improving their consular systems by reducing the number of fees, paying their consuls by fixed salaries, and prohibiting them from engaging in trade.

At the beginning of the next session of congress, President Jackson called the particular attention of that body to the desirability of speedily revising all the laws relating to consuls, and announced his purpose of communicating at a later date a full report upon the subject from the secretary of state. (Richardson: Messages and State Papers, vol. ii, p. 554.) Meanwhile, Mr. Van Buren had been succeeded by

Edward Livingston, and upon him devolved the task of preparing some definite plan. How well he did the work was appreciated when on March 2, 1833, President Jackson laid his report before congress. (Senate Document, No. 83, 22d cong., 2d session.) It was by far the ablest argument made by any one up to that time in favor of a better organized and more adequately paid consular system, and it formed the basis of nearly all the important changes which were afterwards proposed. In regard to the existing system Mr. Livingston said:

Our consuls, with very few exceptions, are commission merchants, anxious, like all other merchants, to increase their business and obtain consignments. In many, perhaps the greater number of cases, the place is sought for chiefly for the advantage and the influence it will give to extend the commercial affairs of the officer. Can it be believed that this official influence will always be properly exercised? When it is, will not contrary suspicions be entertained? This must create jealousy, detraction, and all the arts that rivalry will exercise and provoke, amidst which the dignity of the public officer is degraded, and his influence with the foreign functionaries lost. The consul at least, therefore, if not the vice consul, ought to be salaried officers. They will never, then, by their countrymen, be suspected of acting towards them as their commercial interest, not as their duty, requires; and their complaints in behalf of their fellow citizens will be attended to, because they will not be liable to the suspicion of advocating their own interest; consular offices would no longer be held in counting-houses, nor the consul himself, called from defending the case of an American citizen to sell a barrel of sugar, or to dispatch the settlement of an account.

He therefore proposed to have thirty consuls who should receive salaries of \$2000 each and 126 vice consuls and commercial agents who should receive salaries averaging \$1000 each. According to his estimate the entire salary list would not amount to more than \$186,000.

Mr. Livingston urged further that the rights, privileges and duties of consuls should be more precisely defined, and himself prepared a pamphlet of instructions as far as could be done without legislation for the guidance of consuls in the performance of their duties. He was strongly opposed to the collection of fees by consuls as a means of defraying the expenses of the system, and held that it was not only an unjust tax upon commerce, which it was important to relieve of unnecessary burdens, but that it singled out consular officers as a class distinct from other public officers whose entire compensation was provided from the treasury.

Convincing as these arguments were that some improvement in the consular system should be made, they failed to impress congress sufficiently to induce it to act. A similar fate befell the plans submitted to that body in 1838 (House Executive Document, No. 467. 25th cong., 2d session), and 1844 (House Report No. 166, 28th cong., 1st session), although in the latter year a bill was introduced by Senator Semple but was indefinitely postponed. (Speech of Hon. J. W. Patterson, May 11, 1864, Pamphlets, U. S. Consular Service, vol. iii, Department of State Library.) That these continued efforts in the direction of reform were having some effect, however, was apparent from the action of a select committee of the house of representatives, in 1846 (House Report, No. 714, 29th cong., 1st session), in reporting a bill somewhat along the lines advocated by Secretary Livingston with the addition of a provision designed to secure reasonable permanency of tenure. It was evident that the committee had inquired carefully and intelligently into the existing consular system and had become convinced that radical changes were required to make it adequate to the needs of the rapidly increasing commerce.

The secretary of state, Mr. Buchanan, who was requested by the committee to report upon the bill, reviewed the whole subject in detail and strongly recommended that congress should specify the number and compensation of consuls and vice consuls, and should create a new grade of consuls general to be used only where foreign governments were represented by officers of that grade. He also urged the enactment of a general law which should revise the scattered statutes relating to consuls, define clearly their duties and powers, and prescribe the fees to be collected by them. His recommendations were not acted upon, however, and nine years elapsed before any further effort was made.

In 1854 a bill to remodel the diplomatic as well as the consular service was prepared and presented to the house of representatives by Mr. Perkins of Louisiana (House Report No. 348, 33d cong., 1st session), who had made a careful study of the subject and whose able advocacy of the bill in congress was instrumental in securing the adoption of the measure by a majority of the members of that body. This measure went much further than any one of the previous plans, and it embodied the essential features of all of them.

When it became a law on March 1, 1855, and was submitted to the

attorney general for interpretation it was found to contain so many defects (8 Op. Attorneys General, pp. 189, 243), that the following year, congress was induced to pass a similar law free from these objectionable features, entitled "an act to regulate the diplomatic and consular systems." (Act of August 18, 1856, 11 Statutes at Large, p. 64.) The main purpose of this law was to gather into one general scheme the large number of unrelated and practically independent offices, classify them according to a definite plan, prescribe rules and regulations under which they should be conducted, and provide more certain and adequate compensation. The more important posts were divided into two classes, and the consuls in these classes were to receive salaries in lieu of all commissions and fees for services rendered by them. The officers in the first class, who were to receive salaries of from \$1500 to \$7500, were prohibited from engaging in any business, while those in the second class, who were to receive salaries of from \$500 to \$1000, were permitted to engage in business. All the officers not enumerated in the two classes described were to be compensated as before by the fees they might collect for their official services. Other sections of the act brought together the scattered statutes defining the duties of consuls, revised and supplemented them and conferred full authority upon the president to prescribe regulations which should have the force of law for the guidance of consuls in the performance of their duties. It was at last made possible to bring about some reasonable degree of accountability on the part of consuls in respect not only to the income of their offices, but to their conduct, reports, absences, and miscellaneous duties.

It was the intention of the framers of the act to make it the beginning of a permanent consular service to be composed of men of experience who had grown up in the work. To this end the act authorized the president to appoint twenty-five consular pupils at salaries not to exceed \$1000 a year. These officers were to be examined before their appointment and were to be assigned to consulates in the discretion of the president. At the next session, however, congress not only refused to appropriate the amount necessary for their salaries but repealed the section authorizing their appointment. Through persistent effort on the part of the president and friends of reform in congress in 1864 the provision was restored in part by creating a corps of thirteen consular clerks with salaries of \$1000 a year who were to

hold office during good behavior and could not be removed except for cause stated in writing and submitted to congress. (Act of June 20, 1864, 13 Statutes at Large, p. 139.) A later act gave consular clerks \$1200 a year after five years of service. (Act of June 11, 1874, 18 Statutes at Large, p. 70.) But the original purpose of creating this corps of officers failed because the lack of permanency of tenure in the higher offices of the service made consular clerks unwilling to accept promotion.

A further effort to insure the appointment of capable men as consuls was made in 1866 when an order was promulgated requiring all applicants for consulships to present themselves for examination before a board consisting of the second assistant secretary of state, the examiner of claims, and the officer in charge of the consular division. Only one examination appears to have been held under this order, and of the nine candidates examined, two were found not to be qualified, one because lacking in knowledge of foreign languages, and the other because of general incompetency. The next step was the promulgation of the executive order of April 16, 1872, which was soon superseded by that of March 14, 1873. These orders were issued under the civil service act of March 3, 1871, and provided that vacancies in any grade of consulates or clerkships in the department of state might be filled either by transfer from some other grade in the clerical, consular or diplomatic service under that department; by the appointment of persons who had previously served satisfactorily under the department of state; or by the appointment of persons who had produced satisfactory references as to character, responsibility, and capacity, and who had, on examination, been found to possess the necessary qualifications. The board of examiners was composed of three officers of the department of state, and a number of persons were examined during the years 1873 and 1874. It is said that the system worked well, and resulted in the improvement of the consular service; but it was given up contemporaneously with the suspension of the work of the civil service commission by the refusal of congress to make the necessary appropriations for the support of that body.

Irregularities which had been revealed from time to time and the lack of any method of determining the fitness of candidates for appointment and of any permanency of tenure, led to a series of attempts to improve the organization of the service and remove it from the influ-

ence of politics. As early as 1868 a bill was prepared by Representative Patterson to grant salaries to all offices which were necessary and to abolish all others; to grade the service; to regulate the appointments by competitive examinations and encourage efficiency by promoting consuls in the lower grades to vacancies in the higher ones. (Senate Report No. 154, 40th cong., 2d session.) A similar bill passed the senate in March, 1872 (House Miss. Doc. No. 61, 42d cong., 3d session), but got no further and the subject appears to have been dropped until 1884 when President Arthur and Mr. Frelinghuysen, then secretary of state, strongly urged congress to provide suitable salaries for all consuls, to require all fees of whatsoever description to be paid into the treasury; to establish a rigorous system of inspection; and to abolish the office of consular agent and substitute in its stead that of salaried vice consul in accordance with the custom of foreign nations. (House Executive Document, No. 121, 48th cong., 1st session; House Executive Document, No. 146, 48th cong., 1st session.) Again in 1886 a bill was urged in which was included provision for a graded service with promotion based upon efficiency. (House Document No. 121, 48th cong., 1st session.) Congress manifested no interest in the subject, however, and no further effort was made until 1895. In that year, François S. Jones, a clerk in the department of state, who had given some attention to the study of foreign consular systems, particularly that of France, drafted a bill which was introduced in the senate by Senator Morgan, of Alabama, and reported favorably from the committee on foreign relations. (Senate Report No. 886, 53d cong., 3d session.) The bill proposed to remodel the diplomatic as well as the consular service, and followed in principle the other bills which had been proposed since 1856. While it received no special attention from congress, it served to direct attention to the subject, and revive the efforts that had been made in the direction of improvement.

Although at the beginning of his second administration, President Cleveland had made an unusual number of changes in the personnel of the consular service, toward the end of that administration, in the autumn following the failure of the Jones-Morgan bill, he undertook to regulate, in part at least, the selection of candidates for consular appointments by ordering, on September 20, 1895, that any vacancy

in a consulate with compensation of over \$1000 and not more than \$2500 should be filled in one of the following ways:

(a) By the transfer of some one in the service of the department of state whose duties had been of a character to qualify him for consular work;

(b) By the appointment of a person who had previously served in a satisfactory manner in the department of state;

(c) By the appointment of a person who had furnished evidence of character, had then been selected by the president for examination and had been found to be qualified.

The examination based upon this order was both oral and written. The written examination was entirely technical and covered the principal portions of the consular regulations applicable to the duties of the post to which the candidate desired to be appointed. The oral examination, which was stenographically reported, was broader and was designed to bring out the personal fitness and qualifications of the candidate. It included a test of the candidate's ability to speak the language of the country in which his prospective post was situated or the French language. For the time being the examination proved to be a fairly satisfactory test of the qualifications of the candidates, and the board of examiners did their work thoroughly and conscientiously. Of the thirteen candidates examined before the fourth of March, 1896, eight passed and five were rejected. (Foster: *Practice of Diplomacy*, p. 240.)

But the end of the administration was too near to permit the new system to have a fair trial in the hands of those who were responsible for it. Moreover, President Cleveland's removal at the beginning of his term of the majority of the consuls general, consuls and commercial agents and the appointment in their places of persons who had contributed to the success of the party weakened the effect of the order, and gave reasonable excuse for a similar course on the part of his successor. President McKinley left the order unchanged, but any impression of permanency of tenure was soon removed by the prompt recall of many of the most capable consuls and the appointment in their places of friends of the administration. Of the 272 consuls then in office, 238 were recalled and new and untried men put in their places. (Century Magazine, vol. 35, 1898-99, p. 604.) The examination which had been of some real value under the preceding president was too tedious a process in view of the large number of candidates that came

within its scope. Gradually the standard was lowered; the oral and most important part of the examination was at first conducted in a perfunctory manner and later discontinued altogether; the written test was at last rendered so simple that it amounted merely to a test of ability to memorize. It has been said that of 112 candidates examined at the beginning of the administration of President McKinley, only one was rejected. (*Century Magazine*, vol. 35, 1898-99, p. 604.)

The strong protests made at the time by the press of both of the leading political parties against the large number of removals were due in a measure to a better appreciation on the part of the public of the nature of the duties which consuls were called upon to perform and a clearer understanding of the vital importance to our commercial and other interests abroad of greater permanency of tenure and of a change in the method of selecting candidates for appointment. In the early years of our history the duties of our consuls were very largely confined to the care and protection of our merchant marine. But as the import trade increased, it became desirable more effectually to safeguard the customs revenues and consuls were directed to require foreign exporters to the United States to make oath before them to the value of the merchandise whenever it was subject to an *ad valorem* duty at the American port of entry. Gradually this function had been extended until every invoice of imported merchandise valued at more than one hundred dollars was required to bear a certificate of an American consul to the correctness of the market value of the merchandise. The practical utility of the certification of invoices was shown during the early part of President McKinley's administration. A consul general in Europe having become convinced that the merchandise exported from his district was being invoiced below its true market value, began a careful expert investigation for the purpose of ascertaining the cost of manufacture and actual selling price, with the result that upon the strength of information supplied to the customs officers the revenues from merchandise exported from his district alone were increased approximately \$800,000 a year. (House Report No. 1313, 57th cong., 1st session.) Consuls had also become guardians of the health of our seaport cities by virtue of the law which required vessels bound for the United States to obtain consular bills of health which made it possible for the quarantine officers at our ports to know the exact sanitary and

health conditions prevailing at foreign ports at which the vessels had touched and the condition of the vessels and their crews and cargoes at the time of their departure for the United States. Though less frequently than at the time when the United States possessed a large merchant marine, consuls still exercised important functions in quelling mutinies and returning accused sailors for trial in this country; acting as protectors of American seamen in their discharge abroad and in the collection of wages due them, maintaining them when ill or destitute and under some conditions affording them transportation home. The receiving of protests and declarations, one of the first duties imposed upon consuls by law, and the general powers of notaries public which had been conferred upon them brought them into close contact with many of our citizens. The protection of American citizens abroad had always constituted one of the most important duties of consular officers and one of the most severe tests of their efficiency. It is the duty of a consul to endeavor upon all occasions to maintain and promote all the rightful interests of his countrymen; to protect them in all the privileges provided for by treaty or conceded by usage; and to aid them before the local authorities of the foreign country in all cases in which they may be injured or oppressed. But anything less than an early release of an offending citizen from a foreign prison frequently calls forth complaint against the consul, and these complaints although usually unjust contributed much to the development of a sentiment in favor of reform. More important, however, was the dissatisfaction with the administration of justice by consular officers in so-called unchristian countries. Our consuls were empowered by the early treaties with the Barbary States to settle all disputes between their countrymen and to be present at the trial in the local courts of cases to which Americans and subjects of the Barbary States were parties. These powers were somewhat enlarged in respect to American citizens in Turkey by the treaty of 1830 with the Ottoman Porte. The treaty of 1844 with China gave to American consuls in that country jurisdiction over all cases between citizens of the United States, and over all cases in which Americans were defendants. This jurisdiction was further enlarged by the treaty of 1880 with China which secured to our consuls the right to be present at the trials of cases in the Chinese courts to which American citizens might be parties. The law of 1848 as amended by later

statutes (Act of June 22, 1860, 12 Statutes at Large, p. 22; Act of July 1, 1870, 16 Statutes at Large p. 184; Act of March 23, 1874, 18 Statutes at Large, p. 23) defined the manner in which cases should be tried, and gave to consuls jurisdiction over all cases, civil and criminal, including capital offenses. In civil cases in which the matter in dispute was above \$500 and below \$2500 an appeal could be taken from the consul to the American minister to China, and cases involving more than \$2500 could be appealed to the circuit court of California when the defendant held the decision erroneous in point of law. Criminal cases could be appealed to the minister and under certain conditions from him to the circuit court of California. These acts were made applicable to Turkey and other countries in which the United States exercised extraterritorial jurisdiction so far as might be permitted by our treaties. The importance of the intelligent and rightful discharge of these duties, involving the lives and civil rights of American citizens is apparent. Unfortunately many of our consuls who were called upon to exercise judicial functions had not been trained in the law, and several of them so discharged these duties as to bring upon themselves severe criticism.

The most potent factor in the movement for reform, however, was the realization that consuls could be instrumental in aiding materially in the development of our export trade. Prior to 1856 there had been published at long intervals compilations of the reports of consuls upon commercial subjects. The law of 1856 authorized the annual publication of consular reports, but in 1880 the secretary of state, Mr. Evarts, inaugurated a monthly publication entitled *Consular Reports*. (Hunt: *The Department of State*, p. 143.) To satisfy the public demand for information upon special subjects connected with trade this was soon followed by another volume issued from time to time under the title of *Special Consular Reports*. As the public interest in the commercial information furnished by consuls continued to increase, a plan was adopted, largely as an experiment, of publishing daily all consular reports of current value under the title of *Advance Sheets of Consular Reports*. The first issue appeared January 1, 1898. The extracts from it which were printed in the daily newspapers did more, perhaps, than anything else to impress the public and the business men in particular with the fact that by supplying timely information consuls could perform a service of the utmost importance to our manu-

facturing and other interests and greatly aid in the sale of our products abroad. This afforded a practical basis upon which to demand a reorganization of the consular service, and with a better understanding of the other duties of consuls and a clearer appreciation of the manner in which they should be discharged, public sentiment in support of an efficient consular system rapidly developed.

The commercial organizations over the country began to manifest an interest in the subject. The national board of trade appointed a regular committee on consular reform. The Cleveland (Ohio) chamber of commerce represented by Mr. Harry A. Garfield brought about an organization of the chambers of commerce and boards of trade in the principal cities of the country. (Senate Report, No. 499, 57th cong., 1st session.) Later the National Business League of Chicago and the New York Board of Trade and Transportation undertook a systematic campaign on even broader lines. The bills so far presented had failed to meet with the entire approval of the commercial organizations, and besides there was lack of harmony among friends of the movement in both houses of congress. With a view of concentrating the efforts upon one measure upon which all could agree, and which should embody all the essential principles in the most simple and practical form, a bill was drafted by Gaillard Hunt, now chief of the bureau of citizenship of the department of state, which was acceptable to the commercial organizations and subsequently to the men in the senate and house of representatives who were in favor of reform. The bill was first introduced in the senate by Senator Lodge, of Massachusetts, and later in the house of representatives by Mr. Adams of Pennsylvania.

No action was taken except to report it favorably in each house, but the bill continued to be presented anew at each session of congress.

Fortunately for the success of consular reform Elihu Root became secretary of state in the summer of 1905, and one of the first subjects to which he directed his attention was the improvement of the consular service. In collaboration with Senator Lodge, he drafted a bill following the general lines of those which had preceded it but in addition providing for five inspectors of consulates, prohibiting consuls from engaging in business and from practicing law for compensation, and prohibiting the employment in consular offices of any but American citizens in clerical positions the annual salaries

of which were one thousand dollars or more. (Senate Report No. 112, 59th cong., 1st session.) One of the vital features of this bill was a provision for the appointment of candidates to the two lowest grades after having passed an examination to test their fitness, and the filling of vacancies in the higher grades by the promotion of officers from the lower grades of the service. This and other important provisions in the bill were not acceptable to the senate, however, and were stricken out in the committee on foreign relations. It had been desired also to obtain the consent of the senate to the appointment of consuls to grades of the service without respect to place in order that they might be assignable in the discretion of the president and thus secure greater flexibility of administration; but this provision was also disapproved so that when finally passed by congress the bill classified the service by providing for 310 consulates general and consulates at as many foreign ports; it arranged these offices in sixteen classes with salaries of from \$2000 to \$12,000 each; it created five inspectors of consulates; prohibited the appointment of foreigners to clerkships in consulates with annual salaries of one thousand dollars or more; prohibited consuls from engaging in business or practicing law or being interested in the fees of any lawyer; required the performance of notarial services which had theretofore been optional; required all fees to be paid into the treasury; made the salary provided by law the sole compensation of an officer; and provided for the use of adhesive fee stamps as a check against failure to account for fees that might be collected. (House Report No. 2281, 59th cong., 1st session.)

Although this act was almost wholly administrative in character, in no sense touched the existing system of appointments, and made no provision in regard to the tenure of office, it specifically abolished the personal fee system and provided more liberal salaries, and made it possible to organize the service upon a plan designed to promote efficiency. Before the act became effective on the thirtieth of June, 1906, a large number of promotions had been made on the basis of an efficiency record established in the department of state by Secretary Root. These promotions indicated a determination on the part of the president and the secretary of state to adopt regulations in harmony with those provisions of the bill which had failed to receive the approval of congress. Then five of the most experienced officers were called home to consult with the chief of the consular bureau and assist in outlining the regulations

made necessary by the new act. The moral effect of this step was alone sufficient to justify this departure from the traditional policy of the department of state. As a result of the deliberations of these officers, regulations were prepared for the newly created inspection force, outlining the scope of their investigations and the manner in which they were to be conducted; suggestions were made for the examination of candidates for admission to the service; and many improvements in the general regulations were agreed upon.

Having failed to induce congress to enact a law regulating the selection of persons for appointment to the consular service, President Roosevelt, upon the advice of Secretary Root, and in the exercise of the constitutional powers of his office and the power conferred upon him by statute, issued an order on June 27, 1906, which with the regulations of the board of examiners created by that order, inaugurated a system governing appointments and promotions which is substantially as follows:

1. A board of examiners, consisting of the third assistant secretary of state, the chief clerk of the department of state and the chief examiner of the civil service commission, whose duty it is to formulate rules and hold examinations of candidates for admission to the consular service.

2. The examination is open only to persons between the ages of 21 and 50, who are American citizens of good moral character and habits, physically and mentally qualified for the proper performance of consular work, and who have been especially designated by the president for appointment subject to examination. The age limit in the examination for student interpreter is from 19 to 26, inclusive, and the candidate must be unmarried.

3. The examination is both written and oral, each part counting equally and requiring an average on both of at least eighty in order to pass. The subjects embraced in the written examination are: one modern language other than English; the natural, industrial, and commercial resources and commerce of the United States, with special reference to the possibilities of increasing and extending the foreign trade of the United States; political economy; the elements of international, commercial and maritime law; American history, government and institutions; political and commercial geography; arith-

metic; the history, since 1850, of Europe, Latin America, and the Far East, with particular attention to political, commercial and economic tendencies. To become eligible for appointment as consul in a country in which the United States exercises extraterritorial jurisdiction, a supplementary examination in the common law, the rules of evidence and the trial of civil and criminal cases is required. The oral examination is designed to determine the candidate's character, business ability, alertness, general contemporary information, and natural fitness for the service, including moral, mental, and physical qualifications, character, address and general education and good command of the English language.

4. Candidates who successfully pass the examination may be appointed only to the eighth or ninth grade of consuls, or as vice or deputy consuls, consular clerks or student interpreters.

5. Persons serving in the department of state with annual salaries of two thousand dollars or more may be promoted to any grade of the consular service above the eighth grade.

6. Vacancies in offices above the eighth grade are to be filled by promotion from the lower grades of the service.

7. Vacancies in classes eight and nine are to be filled (a) by the promotion of consular clerks, vice consuls, deputy consuls, consular agents and student interpreters who shall have been appointed upon examination; or (b) by new appointments of candidates who have passed a satisfactory examination.

8. No promotion is to be made except for efficiency as shown by the ability of the officer, his promptness, diligence and general conduct and fitness.

9. The political affiliations of candidates are not to be considered, and other things being equal, appointments are to be so made as to secure proportional representation of all the states and territories in the consular service.

It may be explained that the examination is not competitive, but the high standard fixed by the president's order, and the number and character of the subjects which the examination is required to cover afford ample assurance that no one not well qualified is likely to be appointed consul.

President Roosevelt's order marks the beginning of a new era in our foreign service, and if enforced strictly will in time give the United

States a consular system second to none in all the world. The establishment by Secretary Root of an efficiency record upon which a consul must depend for advancement or even retention has already had a stimulating effect upon the entire service. It is no longer sufficient that a consul should be able merely to exhibit a clean record free from complaints or criticisms. He must now produce positive results of more than average character if he would be rated relatively high in the scale of efficiency. He may no longer rest content in the knowledge that his friends at home will aid him in a desire to reach higher rank in his chosen field of endeavor. The only friend of real service to him now is a record of efficient and faithful performance of duty.

Through the instrumentality of the system of inspection, the department of state for the first time in its history will soon be in possession of detailed reports upon every American consular office in the world. The practical value of these reports to the officers in charge of the administration of consular affairs at home can scarcely be overestimated. For years, with the exception of partial inspections authorized by congress at long intervals, there have been no means of ascertaining the condition of the great majority of offices except through statements of the officers themselves or of American travelers who have had occasion to visit them. There is no doubt that the inspection will suggest many improvements that may be made, and that it will be followed by wiser and more intelligent administration, better discipline, and more practical results.

It is clear that substantial progress in the improvement of our consular service has been made, but whether the results already accomplished are to be permanent is by no means certain. So long as the present administration continues in power the president's order will be enforced, but there is always danger that a succeeding administration may be less favorable to a system which bases appointments upon fitness regardless of other considerations, and that the work of the past year may go for naught. It is for this reason that those who are especially interested in an efficient and representative consular force are already engaged in furthering a movement to the end that congress may be induced to embody the executive order in a law, or at least to formally approve the principles of the order by joint resolution. In one of these courses appears to lie the only hope at present

of insuring the permanency of the existing system of appointments and the development of a body of consular officers qualified by training and experience to deal with the delicate and difficult problems of our foreign commerce and to protect the increasing personal and financial interests of our citizens in foreign lands.

WILBUR J. CARR

CITIZENSHIP AND ALLEGIANCE IN CONSTITUTIONAL AND INTERNATIONAL LAW

The recent report on Citizenship of the United States, Expatriation, and Protection Abroad, together with the work of Mr. Van Dyne on Citizenship of the United States, and the invaluable Digest of International Law, by Prof. John Bassett Moore, render easily accessible and readily comprehensible the principles of the American law with reference to the status of our citizens and of aliens for the time being within our territorial limits. At the same time, however, these publications make more evident the fact that, in many instances, the conflicting claims of two or more states upon the same individual are settled rather by mutual concessions than upon principle; that legal and political rights are asserted, but with an understanding, more or less explicit, that under given circumstances they will not be exercised. Thus, by a legislative act, legally binding upon our executive and judicial officers, we have declared the right of the individual to expatriate himself to be an absolute and indefeasible one, and that the naturalized American citizen is to have the same rights and is to receive the same protection as the native-born citizen, whether or not the state of original allegiance consents to the expatriation thus involved. In practice, this law, thus formally declared, has never been rigidly enforced, for the very good reason that to attempt to do so would lead to constant and serious international difficulties.

In other respects, also, the status of citizenship seems not satisfactorily determined. By long-continued executive practice, by constitutional declaration (Fourteenth Amendment), and by judicial determination (*United States v. Wong Kim Ark*, 169 U. S. 649) the United States have declared that the common-law principle of *jus soli* shall govern in determining citizenship — that in all cases persons born in the United States and subject to the jurisdiction thereof are to be held native-born citizens. Yet, when convenience

and sentiment indicate a different rule, we do not hesitate to affix our citizenship to specified classes of persons born on foreign soil. Again, the political status and the civil obligations of inhabitants of districts not annexed to but occupied by the military forces of a foreign nation, though settled in practice, have not been satisfactorily deduced from any general doctrine of the essential nature of political allegiance. Finally, we continue to have not a little difficulty in determining the exact character of status possessed by the inhabitants of the insular possessions recently annexed by, but not yet "incorporated" into, the United States.

It is clear, then, that it is desirable to obtain, if possible, a definition of the terms "citizenship" and "allegiance" as abstract political concepts that will enable us to resolve logically these various difficulties, instances of which have just been mentioned. To the attainment of this end it is the aim of this paper to contribute.

I.

By a "citizen" is commonly meant a member of a state, the word "citizenship" being employed to designate the status of being a citizen. "Allegiance," as its etymology indicates, is the name for the tie which binds the citizen to his state — the obligation of obedience and support which he owes to it. The state is the political person to whom this liege fealty is due. Its substance is the aggregate of persons owing this allegiance. The machinery through which it operates is its government. The persons who operate this machinery constitute its magistracy. The rules of conduct which the state utters or enforces are its law, and manifest its will. This will, viewed as legally supreme, is its sovereignty.

In every state, then, we find existing the sovereign and subject, the legal superior and legal inferior. In feudal times this relationship was of an intimate and individual kind. A vassal owed fidelity and obedience to a particular person as his lord. Based upon, and as a development out of, this feudal relationship we find the English law of to-day declaring that all English citizens owe allegiance to — that is, are vassals of, the reigning king or queen, as their liege and sovereign lord. They are *ad fidem regis*. Correctly viewed, however, their allegiance is really to the English State, viewed as a

political person, and the Crown is but the formal or outward symbol and representative of that abstract political personality.

Citizenship thus imparts a *personal* relationship; and the sovereignty of the state, by which term is indicated the absolute and supreme legal supremacy of the state over its subjects, is, in consequence, essentially personal in character. This fact is of supreme importance in fixing the nature of citizenship, and one that needs to be especially emphasized because of the statement so currently made, and so generally received, that whereas in former and feudal times sovereignty was personal in character, it is now territorial, when in truth sovereignty is not now essentially territorial at all, but as personal as it ever was.

The predication of territory as an essential element of the state, and the description of its sovereignty as territorial in character and extent, is due to a confusion between the nature of the state when viewed in its relation to other states and its character when considered from the purely constitutional or domestic standpoint.¹ Viewed constitutionally, a state is a purely legal institution. It is legal, not in the sense that it owes its existence to a law, but because it operates wholly through law. Its governmental organs and officials have their respective spheres of authority defined and determined by law, its commands are laws, and the reciprocal relations between itself and the persons subject to its authority are in every case legal in character. Its sovereignty is, in short, simply and solely legal supremacy.

Being in essence simply *will*, it lies wholly within the discretion of those exercising sovereignty to determine the character of the commands it shall utter, and the persons over whom it shall claim authority. All persons, then, wherever situated, and whatever their other political relations and affiliations, are potentially subject to any given sovereignty. Thus it is an established principle of our

¹ The difference between the connotation of the term "state" as used in constitutional law, and that which it has when employed in international law, has been carefully treated by Mr. Robert Treat Crane, Ph.D., in his doctoral dissertation entitled, *The State in Constitutional and International Law*. This study, prepared in the Political Science Seminary, conducted by the writer of this article, has been published in the *Johns Hopkins University Studies in Historical and Political Science*.

constitutional law, as it is indeed of all developed systems of constitutional jurisprudence, that wherever and whenever sovereignty is asserted to exist by the political department of the government the courts of that government are bound thereby.² In a legal, constitutional sense, therefore, the subjects of a state are those persons, wherever they may be, or whatever their nationality over whom legal control is asserted by the proper authorities of that state. It is thus possible for any one state to extend the legal force of its laws over individuals owing allegiance to other states, and, in fact, when those aliens are on the high seas or within their territory, such control is claimed and exercised by all modern states. It is furthermore possible for a state to declare its laws, or certain of them, binding upon its own citizens when abroad. The sovereignty of a state being personal and not territorial, the constitutional subject of a state remains a subject wherever he may be. He is thus, when abroad, entitled to the protection of his native state, and, on the other hand, may be, by that state, held responsible for acts committed while abroad. Thus, for instance, the French law governing marriage and divorce is held to govern the French citizen wherever he may be, and his marriage solemnized according to the *lex loci* is not held valid by French law unless the special requirements of that law have been satisfied.

Illustrations of the exercise of sovereignty outside of the territorial limits of the state exercising it are seen in the present administration of Cuba by the United States, in the establishment of the United States Court for China, and in the extraterritorial jurisdiction exercised by consular courts generally. In all these cases, viewed constitutionally, these governmental agencies, and the officers who administer them, have a two-fold legal status, one derived from the state in which they are situated and one from the other state by which

² *Foster v. Neilson*, 2 Pet. 253; *United States v. Reynes*, 9 How. 127; *Jones v. United States*, 137 U. S. 202. In the last case, the court say: "Who is the sovereign, *de facto* or *de jure*, of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances."

they are created or commissioned. Thus, the United States officials now in Cuba, and the United States judge and other court officers in China, are commissioned under the United States law, Congress and the President deriving their constitutional power to appoint them from the control over foreign and military affairs granted them by the Constitution. But, looked at from the local viewpoint, they are *quoad hoc* agents of the state within whose territory they act, and the law which they administer is the law of that state. Thus, the Supreme Court of the United States was quite correct in holding in the Ross case (*In re Ross*, 140 U. S. 453) that the United States constitutional provision as to jury trial did not apply in the United States consular court in Japan; but it was incorrect when it gave as a reason that "By the Constitution a government is ordained and established 'for the United States of America', and not for countries outside of their limits. The guarantees it affords against accusations of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad." The correct reason why, in this case, jury trial was not necessary was, not because the Constitution had no application outside of the territory of the United States, but because the consular court was in fact applying local Japanese law.

The United States Constitution may operate outside of the territory of the United States. If it did not it would not be possible for any agent of the United States — as, for example, a consul, a consular judge, a diplomatic agent, or a military officer — to exercise authority as such outside of America. But though these officers thus derive their authority from the United States law to act in behalf of the United States, the law which they enforce is the local law, and they act as the agents of the local government in applying it.

II.

In the constitutional sense of the word, it is proper to denominate as a subject or citizen of a state anyone over whom the laws of that state in any wise extend. Thus, the citizens of other countries

temporarily resident or permanently domiciled in a state, and the inhabitants of districts belonging to another state but temporarily under the military occupation of the state in question, are, in a strict constitutional sense, citizens of that state.

It is a doctrine of American constitutional law that mere conquest or military occupation of a territory of another state does not operate to annex such territory to the occupying state. The inhabitants of the occupied district, however, no longer receiving the protection of their native state, for the time being owe no allegiance to it; but, on the other hand, being under the control and protection of the victorious power, owe to that power fealty and obedience. As Chancellor Kent observes in his Commentaries:

If a portion of the country be taken and held by conquest in war, the conqueror acquires the right of the conquered as to its dominion and government, and children born in the armies of a state, while abroad, and occupying a foreign country, are deemed to be born in the allegiance of the sovereign to whom the army belongs. It is equally the doctrine of the English common law that during such hostile occupation of a territory, and the parents adhering to the enemy as subjects *de facto*, their children, born under such a temporary dominion, are not born under the allegiance of the conquered.

And he adds that there is no reason why the same principle should not apply to the United States. (6th Ed., vol. II, p. 42.)

In the quite early case of *United States v. Rice* (4 Wh. 246) the effect of military possession was discussed with reference to the port of Castine, in Maine, which for a time during the war of 1812 was in the possession of the British military forces, but, after the restoration of peace, was restored to the United States. In that case the court said:

It appears, by the pleadings, that on the first day of September, 1814, Castine was captured by the enemy, and remained in his exclusive possession, under the command and control of his military and naval forces, until after the ratification of the treaty of peace in February, 1815. * * * By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary

allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them for where there is no protection or allegiance or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants, were subject to such duties only as the British government chose to require. Such goods were in no correct sense imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions.

In *Fleming v. Page* (9 How. 603) the question arose whether duties levied upon goods entering the port of Tampico, Mexico, at the time it was in the military possession of the United States, were properly levied under the act of Congress laying duties upon goods imported from a foreign country. Chief Justice Taney, who rendered the opinion of the court, said:

It is true, that, when Tampico had been captured, and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For, by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the captured country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries.

But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest, holds it according to its own institutions and laws. And the relation in which the port of Tampico stood to the United States while it was occupied by their arms did not depend upon the laws of nations, but upon our own Constitution and acts of Congress. The power of the President under which Tampico and the State of Tamaulipas were conquered and held in subjection was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government. And the country from which these goods were imported was invaded and subdued, and occupied as the territory of a foreign hostile nation, as a portion of Mexico, and was held in possession in order to distress and harass the enemy. While it was occupied by our troops, they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to

resist. But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war, and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign; nor did our laws extend over it. Tampico was therefore, a foreign port when this shipment was made.

Upon first thought it may appear that the doctrine declared in *Fleming v. Page* is not in harmony with that uttered in *United States v. Rice*, for in the former case it was held that mere military occupation was not sufficient to annex the territory occupied to the United States, whereas in the latter case it was declared that military occupation by the forces of another state did not operate to render the port foreign to the United States. If these two decisions had been given by an international tribunal, and had had reference to the status of the territories viewed internationally, they undoubtedly would have been inharmonious. Looked at from the international side, a country belongs to that power which is in effective control of it. Thus viewed, therefore, Castine belonged to Great Britain while its military forces were in paramount control of it. In like manner, Tampico, viewed internationally, was a port of the United States, and other states would have held the United States responsible for anything that might have occurred there while it was in possession. But when, as was the case both in *United States v. Rice* and *Fleming v. Page*, the question was purely one of domestic municipal law, it was within the province of the Supreme Court to determine in each case the status of the territory concerned according to the peculiar municipal or constitutional law which it was interpreting and applying. In other words, in the *Fleming v. Page* case the Supreme Court would not have been justified in declaring that Tampico did not, during American occupancy, belong to the United States in an international sense; whereas it was justified in holding that, from the viewpoint of American constitutional law, it was not a part of the United States, any more than, for example, was Cuba during the time of its administration by American authorities.³

³ In *De Lima v. Bidwell* (182 U. S. 1), the court say: "It is not intended to intimate that the cases of *United States v. Rice* and *Fleming v. Page* are not harmonious. In fact they are perfectly consistent with each other. In the

III.

As regards the status of subjects of other states temporarily resident or permanently domiciled in a state, the fact that they are within the territorial limits makes them, in a broad constitutional sense,

first case it was merely held that duties could not be collected upon goods brought into a domestic port during a temporary occupation by the enemy, though the enemy subsequently evacuated it; in the latter case, that the temporary military occupation by the United States of a foreign port did not make it a domestic port, and that goods imported into the United States from that port were still subject to duty. It would have been obviously unjust in the Rice case to impose a duty upon goods which might already have paid a duty to the British commander. It would have been equally unjust in the Fleming case to exempt the goods from duty by reason of our temporary occupation of the port without a formal cession of such port to the United States." This reasoning, based simply on principles of justice and expediency, hardly seem convincing, but that the two cases are not necessarily inharmonious has been shown above in the text.

The dissenting justices in the De Lima case also held that the two cases were harmonious, but not upon the grounds stated by the majority. That which, in their opinion, justified the court in holding in the Fleming case that Tampico was not within the scope of the United States tariff laws was because Congress had not so legislated as to bring it within a collection district or to establish a custom house there. "At Castine," they said, "the instrumentalities of the custom laws had been divested; at Tampico they had not been invested."

In *Neely v. Henkel* (180 U. S. 109), with reference to the status of Cuba during American occupation, the Supreme Court says:

"Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the island by the troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

"It is true that as between Spain and the United States — indeed, as between the United States and all foreign nations — Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs, and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.

"It cannot be doubted that when the United States enforced the relinquishment by Spain of her sovereignty in Cuba, and determined to occupy and control that island until there was complete tranquility in all its borders and

members of that state and therefore subject to the authority of its laws. They, in fact, being under the protection of the state where they are, owe an allegiance to it according to the maxim *Protectio trahit subjectionem et subjectio protectionem*. Thus Webster, when Secretary of State, in his report on Thrasher's Case in 1851, declared:

Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance, or renouncing any former allegiance, it is well known that by the public law an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other causes as a native-born subject might be unless his case is varied by some treaty stipulations.⁴

until the people of Cuba had created for themselves a stable government, it succeeded to the authority of the displaced government so far at least that it became its duty under international law and pending the pacification of the island, to protect in all appropriate legal modes the lives, the liberty, and the property of all those who submitted to the authority of the representatives of this country. That duty was recognized in the Treaty of Paris; and the act of June 6th, 1900, so far as it applied to cases arising in Cuba, was in aid or execution of that treaty and in discharge of the obligations imposed by its provisions upon the United States. The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in 8 of article I. of the Constitution as all others vested in the government of the United States, or in any department of the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power."

In *Dooley v. United States* (182 U. S. 222), one of the "Insular Cases" decided in 1901, the doctrine of *Fleming v. Page* is applied in fixing the status of Porto Rico while under the military government of the United States, but prior to the ratification of the treaty of peace ceding the island to the United States. The court said: "[During this period] the United States and Porto Rico were still foreign countries with respect to each other, and the same right which authorized us to exact duties upon merchandize imported from Porto Rico to the United States authorized the military commander in Porto Rico to exact duties upon goods imported into that island from the United States. The fact that, notwithstanding the military occupation of the United States, Porto Rico remained a foreign country within the revenue laws, is established by the case of *Fleming v. Page*."

⁴ Webster's Works, VI. 526. For approvals of this doctrine by the Supreme Court, see *United States v. Carlisle*, 16 Wall. 147; *United States v. Wong Kim Ark*, 169 U. S. 649.

This ascription of allegiance and citizenship to resident aliens is dependent upon, and explained by, the fact, too often not sufficiently emphasized, that allegiance and citizenship, constitutionally viewed, are legal status which are imposed by the state upon individuals, not created in any wise by, or at the consent of, the individuals themselves. Thus, each state determines, by its own law, who shall be considered its native citizen-subjects, who may become its naturalized citizen-subjects, and under what conditions. It is therefore but an application of the general principle, when states assert the right to treat as its own subjects, that is, subject to its own law, aliens within its borders, or inhabitants of territories temporarily occupied by its armies. The correlative of this right of the state to impose its citizenship upon those whom it will, is the doctrine that a state does not, without its consent, permit anyone to become its citizen. Aliens may be refused admission to, or expelled from, its borders, and naturalization may be effected only in accordance with laws previously established.

In the case of citizens of one state living in another state, there thus is, from the viewpoint of constitutional law, a double citizenship — a primary and permanent allegiance being owed by the individual to his native state, and a temporary and qualified allegiance to the state where he is living. So, also, a double citizenship is created when the citizen of a state which does not recognize the right of expatriation is naturalized by another state. In certain cases there may be even a triple citizenship, as, for example, of a child born in England of American parents, and residing in France. And it may be possible to imagine cases in which the fortunate individual may be a citizen of four or more states.

To many the existence of this multiple citizenship seems upon its face to be a *contradictio in adjecto*, and to indicate that the definition of citizenship has broken down. In truth, however, when we revert to the fact that sovereignty, the relation of the political superior to the political inferior, is personal in character, that it is a purely legal concept, and that, as a concept, it is applicable only in the field of municipal law, the objections to multiple citizenship disappear. Not until the domain of international relations is entered do the diffi-

culties appear, and these, as we shall see, are connected not with the formulation of consistent political and legal concepts, but with the application of them in practice.

IV.

Thus far we have been speaking of the state as the possessor of a legally supreme will, termed sovereignty, and of its power to utter legally binding commands. When, however, we turn to the subject of the actual enforcement of these commands, we enter the domain of *power*. Though legally absolute, every sovereign state is able to obtain obedience only to those of its commands which it has the physical might to enforce. Thus, in a multitude of ways, it finds itself legally able to command, but powerless to control. Viewed inwardly, the extent of a state's power is determined by the patriotism and the political characteristics of its own subjects, the form and efficiency of its governmental machinery, and the ability of its magistracy. Viewed outwardly, its power to enforce its will is determined by the existence of other governments, each the possessor of a legally supreme will, and each seeking in many cases to exercise control over persons whom the state in question would, were it able, subject to its authority.

When we enter this domain of international politics and view the state in its relation to other states, we are thus in a realm that differs *in toto genere* from the field of constitutional or municipal law. We no longer have to deal with relations that are essentially legal in character. We no longer have to deal with superior and inferior. Here we find no supreme will, but a collection of equal wills, and the conflict, or at least the interplay, of independent powers. In this international field, the extent of the authority of each state is measured by the greatness of its physical power, or rather of the physical power which it can rally to its support, for the state as an abstract political entity has of course in itself no power. Legally speaking, in the international world, complete individualism prevails. Independence is now substituted for sovereignty. Socially, economically, morally, politically, there may be a family of nations; but, legally speaking, international life is atomistic, individualistic, anarchistic, and in many cases with its units antagonistic.

Out of this conflict of interests and powers, civilized nations have gradually developed rules of conduct applicable to their dealings with one another, which rules, in the aggregate, constitute a considerable body of so-called international law. In the interest of peace, and for mutual convenience and self-interest, certain more or less definite rights and responsibilities have been recognized to belong and attach to every independent political power. Chief and fundamental among these international principles thus developed is that according to which it is held that some one governing power is held to have general control over each portion of the earth's territory, and, reciprocally, is held ultimately responsible for what occurs there.

The government which claims the right of jurisdiction is presumed to have the power to exercise it effectively, and in no case is it permitted by other powers to plead a *non possumus* either because of lack of physical force, or because of peculiarity of constitutional structure. In the international world, nations are not concerned with the legal legitimacy, but with the actual ability of a government to fulfil its international obligations. The annexation of a territory by a state is not recognized by other states until it is effectively occupied. In a civil war, or a war of secession, as soon as the old government is overthrown, or its inability to prevent the secession is demonstrated, the other nations as a matter of course recognize the new government as the *de facto* one to be dealt with.

Although accepted as a working hypothesis, the territorial principle is never recognized as absolute in character. No state is granted by other states absolute and exclusive control of any of its territory. As has been already said, each state is held responsible by other states for whatever goes on within the limits conceded to it, and the extent of this responsibility measures the degree in which its jurisdiction is neither exclusive nor absolute. With regard not only to aliens resident within its borders, but to its own citizens, a state may be held accountable for its acts by other states. Every state claims, and, when necessary, exercises the right to see that its citizens while abroad are reasonably and fairly protected in life and property, and international-law writers assert a variety of grounds for intervention in the affairs of another state, even when no question of the rights of the citizens of the intervening state is directly involved.

Viewed internationally, then, the citizens of a state are those individuals over whom the state is admitted by other states to have primary authority, an authority which, when exercised within its territorial limits, is absolute in character except for those limitations created by the doctrine of "intervention" under which one state is, according to international law, held justified in intervening in the domestic concerns of another. Over these citizens, in an international sense, the authority of a state outside of its own territory is limited by the control over them claimed by the states in which they are actually living or traveling. Though, internationally speaking, the jurisdiction of a state over its own territory is not, as we have seen, absolute and exclusive; constitutionally speaking, its authority is absolute and exclusive. Though, as we have also seen, constitutional theory places no territorial limits to the exercise of a state's sovereignty, it does declare that within the territory claimed as its own by a political power its legal authority is both absolute and exclusive. The existence of the so-called rights of extraterritoriality is, when correctly viewed, no exception to this. Nowhere, perhaps, has the general principle of the exclusiveness of the legal authority possessed by a state over its own territory been better stated than by Marshall in the great case of *The Exchange* (7 Cr. 116), decided in 1812. The Chief Justice says:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restrictions. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

After discussing the immunity from control by local law, ordinarily granted to sovereigns or their representatives when upon foreign soil, Marshall continues:

Whatever may be the principle on which this immunity is established, whether we consider him [the diplomatic agent] as in the place of the sovereign he represents, or by a political fiction suppose him to be extraterritorial, and therefore, in point of law, not within the jurisdiction

of the sovereign at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extraterritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

From the foregoing it will appear that it is not necessary, in the explanation of extraterritoriality, to resort to a fiction, inasmuch as the immunity from the control of local law which the doctrine of extraterritoriality recognizes, is readily explainable by presuming, as Marshall does, the consent of the state where such immunity is enjoyed.

V.

Internationally viewed, the citizens or subjects of a state constitute one homogeneous body. Each of them, so far as other states are concerned, have the same status, the same rights, and the same duties. Viewed constitutionally, however, they include, as we have already seen, all persons in any way subject to the laws of the state, and may be grouped, according to their respective civil and political rights and duties, into as many and as distinct classes as the sovereign state may desire.

Thus, in all states the citizen-subject, and what we may term the alien-subject, are distinguished, though in the civilized states of to-day the tendency is to do away with the differences in the legal status of these two classes, leaving them distinguishable only in the rights and duties attaching to them respectively from the viewpoint of international law. Universally, also, modern states distinguish domiciled and non-domiciled aliens. But just as alien and citizen subjects are distinguished, and alien subjects classified as domiciled and non-domiciled, so may, and are, citizen-subjects grouped into classes with specific legal rights and duties. Thus, male and female, adult and minor citizens, have their respective political and legal status. In the United States we have a clear line of distinction drawn between state and federal citizens, and an especial status has been assigned to members of Indian tribes, as well as to the native inhabitants of our "unincorporated" insular possessions. In the case of both the Indians and the native inhabitants of the unincorporated territories, there is no question but that

they are citizens of the United States both in the international sense and the broad constitutional sense. They are not "citizens of the United States" only as to that term is given a narrow and peculiar constitutional meaning.

In conclusion of this paper it may be pointed out that, given an international world of states, each claiming absolute and exclusive legal authority over all persons and property situated within their respective territorial limits, and at the same time asserting the right to protect, in certain respects, its citizen-subjects when abroad, conflicts of jurisdiction are unavoidable — conflicts which necessarily have to be settled by international agreements expressed either in the form of general custom or specific treaties. These conflicts have, however, been made unnecessarily frequent by the unfortunate fact that the nations of to-day have not been able to unite upon one general rule for determining citizenship. Nor are they in agreement with reference to the subjects of expatriation and naturalization. Furthermore, there is not a little indefiniteness with reference to the circumstances under which one state will interfere to protect its citizens residents abroad, as well as to the extent to which they are released from the control of local law, as, for example, compulsory service in the army.

A general international agreement upon these points would tend greatly to minimize the number of troublesome, even if not often irritating, controversies between friendly powers.

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WOULD IMMUNITY FROM CAPTURE, DURING WAR, OF
NON-OFFENDING PRIVATE PROPERTY UPON
THE HIGH SEAS BE IN THE INTEREST
OF CIVILIZATION?¹

This subject is a timely one from the fact that we are on the eve of the meeting of the second international conference at The Hague, the first conference in 1899 having voted that —

The conference expresses the wish that the proposal which contemplates the declaration of the inviolability of private property in naval warfare may be referred to a subsequent conference for consideration.

The present programme for this coming conference includes this question of the immunity of private property as one agreed upon for discussion.

Before entering into a discussion of the subject, it may be well to make a résumé of the historical status of the question up to the present time so far as the United States, Great Britain, and other civilized countries are concerned.

First, as to the United States:

The first mention of the question in a definite shape was made by Benjamin Franklin in an article to Richard Oswald in 1783, of which he said: "I rather wish than expect that it will be adopted." As a matter of fact it was not adopted.

The pertinent part of this article — which begins with the words, "If war should hereafter arise between Great Britain and the United States, which God forbid" — was, however, incorporated by Franklin in a treaty made later with Prussia.

This treaty between the United States and Prussia, of 1785, in Article XXIII did definitely provide, however, that —

All merchant and trading vessels employed in exchanging the products of different places and thereby rendering the necessities, conveniences and comforts of human life more easy to be obtained and more general,

¹ This address was delivered by Admiral Stockton at the first annual meeting of the Society, held at Washington in April last.

shall be allowed to pass free and unmolested; and neither of the contracting powers shall grant or issue any commission to any private armed vessels, empowering them to take or destroy such trading vessels or interrupt such commerce. (Treaties and Conventions, 1776-1887, pp. 905-906.)

This provision did not, however, reappear in the treaty of 1799, which took the place of the treaty of 1785.

In 1808, Mr. Charles J. Ingersoll, a representative in Congress from Pennsylvania, advocated the exemption of private property at sea from capture, and renewed his advocacy of this exemption during the war of 1812.

In 1823, President Monroe, in his annual message, stated that instructions had been given to ministers of the United States accredited to the leading maritime powers to make proposals to these governments which would look to "the abolition of private war on the sea." The same attitude was taken in the annual message of December 7, 1824. No results followed these proposals, England and France declining to entertain the question and Russia making her acceptance conditional upon that of the other maritime powers.

In 1856, President Pierce, in his message of December the 2d, stated that the Government of the United States was desirous to secure "the immunity of private property on the ocean from hostile capture." To attain this object it was proposed to add to the Declaration of Paris of 1856, as an amendment to the rule that "privateering is and remains abolished," the words —

that the private property of subjects and citizens of a belligerent on the high seas shall be exempt from seizure by public armed vessels of the other belligerent, except it be contraband.

Italy, Prussia, and Russia were at that time ready to accede to the wishes of the United States. Some of the leading men of France were also favorably inclined, but Great Britain, true to her traditional policy, was, however, unwilling to consent to the proposed amendment, and the proposition fell through.

In 1871, a treaty was entered into between the United States and Italy, dated February 26, 1871, which provided in Article XII, that —

The High Contracting Parties agree that in the unfortunate event of a war between them the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels or by the military forces of either party, it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party. (Compilation of Treaties in Force, 1778-1904, p. 453.)

In the instructions to the delegates from the United States to the first Hague conference, dated April, 1899, they were directed to bring the subject of the immunity of private property at sea from capture in war time before the conference, with the result, given at the beginning of this paper, of the reference of the subject to a future conference, a few of the powers abstaining from a vote upon the question. In the annual message of President McKinley in 1898, and of President Roosevelt in 1903, an advocacy of this exemption from capture was again presented, and subsequently action was taken by the Senate and House of Representatives as follows:

That it is the sense of the Congress of the United States that it is desirable in the interest of uniformity of action by the maritime states of the world in time of war that the President endeavor to bring about an understanding among the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents.

The resolution of Congress just read was incorporated by Secretary Hay in his despatch of October 31, 1904, sent to the representatives of the United States accredited to the governments signatories to the acts of The Hague Conference of 1899 with reference to the summoning of a new and second peace conference at The Hague.

The policy advocated by the Government of the United States in regard to the proposed immunity of private property at sea may be said to be continuous and uniform, but it must not be understood that the voices of its publicists and statesmen have always been in accord with that of the Government. As a representative both of dissent and of both of the classes of writers just referred to, I will quote from the writings of Mr. Richard Henry Dana. Discussing the distinction between enemy property at sea and on land, he says:

Where private property is taken it is of such a character or so situated as to make its capture a justifiable means of coercing the power with which we are at war. If the hostile power has an interest in the property which is available to him for the purposes of war, that fact makes it *prima facie* a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea, for it is a subject of taxation, contribution, and confiscation. The humanity and policy of modern times have abstained from the taking of private property not liable to direct use in war when on land. Some of the reasons for this are the infinite varieties of the character of such property from things almost sacred to those purely merchantable; the difficulty of discriminating among these varieties; the need of much of it to support the life of non-combatant persons and animals; the unlimited range of places and objects which would be opened to the military, and the moral dangers attending searches and captures in households and among non-combatants. But on the high seas these reasons do not apply. Strictly personal effects are not taken. Cargoes are usually purely merchandise. Merchandise sent to sea is sent voluntarily, embarked by merchants on an enterprise of profit, taking the risks of war; its value is usually capable of compensation in money, and may be protected by insurance; it is in the custody of men trained and paid for the purpose; and the sea upon which it is sent is *res omnium*, the common field of war as well as of commerce. The purpose of maritime commerce is the enriching of the owner by the transit over this common field and it is the usual object of revenue to the power under whose government the owner resides.

The law of prizes of merchant vessels has been uniformly followed by us in war time, by the Navy Department in capture and the courts in condemnation.²

Let us pass, now, to the historical policy of Great Britain upon this matter. The Government of Great Britain and, until recent times, its publicists have been as uniformly in favor of the continuance of the policy of the capture of private property at sea as the Government of the United States has been opposed to its continuance. Without favorable action on the part of Great Britain

² Prize money for such captures was, however, abolished by act of Congress in 1899, shortly after the Spanish-American war.

As to the severity of land warfare towards private property, extreme cases have taken place in our history, such as the freeing of private slave property as a war measure in the Civil War and also the devastation of the Shenandoah Valley by Sheridan, while on the part of the South there was the confiscation of private debts owed to Northern creditors during the same war.

this war right, now a matter of accepted international law, will not be given up except in isolated arrangements like that of the United States and Italy. So far England's Government as the great sea power has persistently refused to discuss even any proposition for the abolition of the right to capture private property at sea. I will mention only one official statement upon the matter which will stand as a representative statement of the Government of England as to its policy.

Lord Palmerston, in 1859, said:

The existence of England depends upon her maritime preponderance, and she could not maintain herself if she were deprived of the right to capture the private property of the enemy and to make prisoners of the crews of its merchant ships. A maritime power like England cannot renounce any proper means of weakening her enemies, and if she did not take as prisoners the sailors of their merchant ships they would soon be employed in fighting upon the ships of war.

But times change and with them the interests of nations. The great carrying trade of Great Britain is now more than half of that of the world; that of the United States has sunk into insignificance. From the insular conditions of the British isles not only is her food supply sea borne in transit, but the greater part of the raw materials which feed the industries of Great Britain are sea borne, and her large export trade of manufactured articles finds upon the sea also its distributing routes.

As a result some of her statesmen and her writers upon international law advocate the exemption from capture of private property at sea as a policy most conducive to her interests.

Among these I may mention Sir John MacDonell, Dr. Thomas J. Lawrence, Mr. Edmund Robertson, a member of the present Government, and Lord Loreburn, now Lord High Chancellor of the realm.

Still in opposition may be found Atlay, the editor of *Hall's International Law*; Mr. Oppenheim, author of a recent work on *International Law*; Westlake, and Professor Holland.

But even the latter writers have shifted their ground.

Westlake, after discussing the matter under its old received conclusions, says:

The true conclusion appears to be that a real cause, when such may exist, for desiring the detention of the enemy's sailors and ships in order to prevent invasion or the loss of our naval supremacy, is the only adequate motive for maintaining the present practice; and that at the commencement of a war England should offer to her enemy to enter with him into a convention determinable by either side on short notice for mutual abstention from maritime capture except under the heads of blockade and contraband.

Holland, who expresses still his opposition to any change, said in a letter written in 1900:

The question of immunity seems to me to be rather one for politicians and shipowners than for lawyers. It is probable that immunity would now be in the interest of Great Britain, but if so the continental governments, whatever may be continental legal opinion, are not likely to pledge themselves to it, and, even if they did enter into a general convention to that effect, could hardly be relied upon to stand by their bargain. I doubt the expediency of making treaties about lines of conduct which may affect national existence. The strain upon them is likely to be too great for endurance, and one is afraid that one's country might be lulled into security by a paper contract which might be torn up on the outbreak of hostilities.

Lord Loreburn, now the Lord Chancellor, in the present British Cabinet, as Sir Robert Reid and as a member of Parliament in opposition to the late ministry, wrote to the *London Times* of October 14, 1905, a long letter in advocacy of the abolition of this war right. Time permits me to quote three significant paragraphs only of this communication, whose importance is accentuated by the fact that it came from one who is now one of the most distinguished officials of the party in power in Great Britain.

Sir Robert wrote just after the conclusion of the Russo-Japanese war and says:

Let me begin by stating plainly the conclusions which I seek to have adopted. I maintain that conditions have completely changed since the Napoleonic times, and, that, whatever it may have been then, it is now the true interest of Great Britain and also of other nations (though the reasons may be diverse) to exempt private property at sea from capture unless really contraband or its place of destination be a beleaguered fortress.

* * * * *

It may be asked, What prospect is there of altering the law in this respect, even if we desired it? An answer may be found in the history

of this question upon which instructive though it be a few words must suffice. During the last fifty years or more the United States have persistently advocated this change, even to the point of refusing to abandon the right of privateering in 1856 unless all private property (other than contraband) should be declared free from maritime capture. Germany, Austria, Italy, Russia, have all within the last half-century either adopted in their own practice, or offered to adopt, the American view; and continental jurists have almost without exception denounced the existing law. Indeed two nations, Great Britain and France, have alone stood in the way, and but for their opposition the American view would have prevailed many years ago. Perhaps Great Britain and France opposed because they were the only two great naval powers at the time. Perhaps other nations which have since become or resolved to become great naval powers may now oppose what they once supported. That remains to be seen. It is enough to say that the chances of reform in this direction seem very hopeful if only the British Government is willing.

Last year President Roosevelt declared in favor of a new International Conference at The Hague, and notified that, among other matters for deliberation, the United States intended again to press this very subject on the attention of the powers. Unquestionably the American President, with the immense authority he now wields, will exert every effort to attain this point. I trust that His Majesty's Government will avail themselves of this unique opportunity. I urge it not upon any ground of sentiment or of humanity (indeed, no operation of war inflicts less suffering than the capture of unarmed vessels at sea), but upon the ground that, on the balance of argument, coolly weighed, the interests of Great Britain will gain much from a change long and eagerly desired by the great majority of other powers.

As to other powers of the civilized world:

In the war of 1866 Austria, Italy, and Prussia adopted the principle of immunity of private property at sea. The same principle was urged upon France in the war of 1870 by Prussia, but, not being adopted by France, was relinquished by Prussia. Since then no immunity has been asked for or observed in war time.

The change of the status of Prussia from a non-maritime power to the nucleus of the maritime power of the Empire of Germany may lead to a changed attitude on her part upon this subject at an international conference. Certain it is that some continental writers, like Köpeke, Dupuis, and Perels, favor the retention of this war right. The better known writers, like Fioré, Calvo, Bluntschli, and Martens, still advocate immunity.

International agreements and the usages of international law have

given the following vessels of a belligerent immunity from capture on the high seas:

- (a) Ships engaged in voyages of discovery;
- (b) Hospital ships under Hague conventions;
- (c) Cartel ships engaged in the exchange of prisoners;
- (d) Mail packets under conventions;
- (e) Coast fishing vessels innocently employed;
- (f) Ships protected by special license, ransom, or days of grace.

In addition to these, ships engaged in purely charitable or scientific pursuits are generally exempt from capture, released thereafter, or given a license of immunity.

It may be well at this point to enumerate the military advantages claimed for the capture of private property at sea in time of war. We will preface this enumeration, however, by the statement "that the general object of war is to procure the complete submission of the enemy at the earliest possible period, with the least expenditure of life and property." (Naval War Code of United States, Art. 1, p. 5.)

1. The first and most wide-reaching result claimed for this war right is the diminution that would follow in certain countries of food supplies and also of raw materials for manufacture. This interference with food supplies, etc., would bear with especial severity upon insular countries or in case of nearly insular countries that were bordered by the territory of the other belligerent on the land side.

The royal commission on supply of food and raw material in time of war, which was appointed in Great Britain in 1903, reported in 1905 upon this subject. This commission, composed of distinguished men of various classes, included Dr. Holland as an international law expert and Admiral Sir Gerard Noel as a naval expert. A large and valuable amount of evidence is printed with the report.

The commission carefully ascertained the extent of the dependence of the British isles for supplies of food and raw materials for manufacture upon foreign sources, developing the fact that *four-fifths* of the wheat and flour consumed in the British isles was imported over the high seas, and also that the food stocks on hand may and have run down to a supply of seven weeks only for the whole country.

A full realization of the fact was reached that the food thus imported, as well as all other imports and exports of the British isles, when property of British subjects and carried in British ships, was liable to seizure and confiscation by an enemy in war time. The Admiralty authorities and the naval experts who were witnesses before the commission were forced to admit that even with a strong navy trade would to an extent be endangered, supplies to an extent interrupted, and prices to an extent increased. To what extent this would occur the commission found itself divided in opinion.

But it was also shown that the actual deprivation, more or less great, or more or less continued, of food supply would not alone cause suffering, with the consequent pressure upon the Government for relief or peace. A rise in price of food stuffs would cause suffering among the poorer poor, and especially among the unskilled workmen whose wages were so low as to leave little margin to meet such rise in the necessities of life. The number of this class has been estimated to reach about ten millions of people in Great Britain.

The rise in prices which might occur in a war with a maritime power or powers can be a result of the following causes:

- (1) From actual deficiency;
- (2) From increased cost of freight and insurance war risks;
- (3) From apprehension and uncertainty as to what may happen.

In a parliamentary or republican form of government no really unpopular war can be continued in these days for any length of time. Riots would be speedily followed by more effective ballots, until peace would be sought by the governing authorities.

Raw materials essential to manufacture like cotton, wool, sugar, flax and jute, silk, iron ore, timber, hides and leather, petroleum, india rubber and tobacco have to be sea-borne to England.

A wholesale transfer of British vessels to foreign flags would not be a remedy for the danger outlined above. A want of capital to purchase the vessels necessary to carry on the trade of the country would be an essential difficulty, especially with Great Britain, and any transfer made in early war time would be likely to be found to be so fraudulent or colorable in nature as to render the ships liable to capture and, under international law, subject to confiscation. This liability of capture for fraudulent transfer would very probably

cause high insurance risks in transferred neutral vessels as well as in the privately owned ships of a belligerent.

2. The second military advantage that may come with the exercise of this war right would be the capture from an enemy of vessels propelled by machinery and capable of keeping the high seas. Modern naval warfare has constantly and greatly increased the demand for steam sea-going vessels, such as are ordinarily engaged in trade, for purposes of war. To obtain these steam vessels by capture would not only be a deprivation of war resources from an enemy, but it would add very materially to the resources of the other belligerent.

In a number of cases, and practically with all large maritime powers, steam vessels belonging to regular lines and companies are built to meet certain naval requirements, and are as a consequence subsidized in times of peace by governments with a view to their use at the outbreak of war. The vessels of the Cunard Line are so subsidized by the British Government. The vessels of the American Line and others were and are still subsidized by our own, and during the Spanish war were taken into the naval service with both officers and crews. These steamers are not only used directly for naval purposes as scouts, blockading vessels, despatch boats, and commerce destroyers, but also as auxiliaries, doing duty as colliers, supply vessels, distilling ships, machine repair ships, parent ships for torpedo vessels, army and navy transports, hospital ships, etc., etc.

In the Spanish-American war practically every sea-going American steamer was needed and taken for service, while vessels which are still in service to-day were purchased from foreign hands.

3. A third military advantage is the deprivation of men available for naval purposes by their capture with the vessels of which they form the crew. Although they may not be seamen in the old sense of the term, they are men of sea habits, useful both in vessels of war and in naval auxiliaries, and this especially applies to men in the engine and fire rooms. According to the present usages of war these men can be retained as prisoners of war, especially if by training or enrollment they are at once available for the naval service of the enemy.

4. A fourth military result would come from the loss of capital

and property and sea employment from the general paralysis and disruption of the enemy's carrying trade. The sinews of war would be affected by the falling off of custom duties, the most indirect and least inquisitorial source of war revenue. Insurance companies would be affected by captures of insured vessels and merchandise, and shipowners from loss of capital from captures, forced sales, or non-employment of vessels. Loss of property comes home often more heavily than loss of life in this commercial age.

Of the military results accruing from the capture of private property at sea, it may be observed in a general sense that the *indirect ones* of loss of food supply and the consequent distress from this and the cessation of manufactures from want of raw material are the most severe and cause the most distress. The direct results from the loss by capture of ship and cargo is a loss to the well-to-do alone and can hardly be said to militate against the interest of civilization, unless by civilization we mean materialism.

But the question now comes to us, Is it worth while? Can it be claimed that the results are of primary or vital importance as a war-like measure?

First, as to the most serious results of commerce destroying, the reduction or serious deprivation of food supplies.

This matter was very exhaustively and seriously discussed by the British commission previously referred to, with the conclusion embodied in their report that —

With a *strong fleet* we find no reason to fear such an interruption of our supplies as would lead to the starvation of our people, nor do we see any evidence that there is likely to be any serious shortage.

But they go on to say in conclusion that —

In all that has been said above we have assumed that the command of the sea has not been lost, * * * for if that occurred it would no longer be true that we should obtain our supplies without material diminution or that there was no fear of actual starvation.

On the contrary, in that event there would be a serious shortage of supplies from abroad, and if this shortage occurred at a time of year when most of our supplies of home-produced wheat and other cereals and food stuffs has been consumed, not only would a very serious economic rise take place, due to deficiency of supply, which in its turn would probably produce a severe panic, but in addition there might be produced such serious suffering that the country could hold out no longer.

This is the most authoritative declaration upon the subject in recent times, and shows that this military effect of commerce destroying on the most vulnerable nation depends upon her naval supremacy, which would naturally be paramount except in the case of a powerful combination of two or more nations against her. In an insular country like Japan other circumstances exist which might endanger her food supply, but concerning which it is not necessary to dwell upon at this time.

As for loss of carrying trade, transfer of vessels, etc., of which the cruise of the Confederate commerce destroyers is the most striking example, one has only to read the book of Captain Semmes of the "Alabama" returning from a successful commerce-destroying cruise with the knowledge that the days of the Confederacy had become numbered and its fate settled elsewhere.

Even his cruise, successful as it was, cannot be repeated in present times. His objective was the sailing vessel, and his success and that of his companion vessels was largely due to his ability to keep the sea under sail without the expenditure of coal. The "Alabama" cruised five months at one time without coaling, and four times for the period of three months without replenishing her bunkers. The losses inflicted by her were also more indirect than direct. The entire loss of private vessels during the Civil War was only five per cent. of our merchant marine by capture, and thirty-two per cent. by sale and transfer, etc.

In these times privateering can be eliminated as an element in commerce destroying, both from the lack of commercial success that will attend it, and from the general acquiescence of all civilized powers, in *all* of the articles of the Declaration of Paris. Commerce destroyers have now as their objective almost entirely steam vessels of increased speed, and they can as a rule keep the sea for two or three weeks only without re-coaling, being themselves in danger of capture, if the enemy has an adequate navy.

The capture of private property at sea being then a military operation of a minor or secondary nature without the command of the sea, let us for a moment consider it with respect to the interests of our own country.

Its *retention* as a war measure will be of little damage to us with

our continental position, which is self-supporting so far as food and the necessities of life are concerned. It is probable that in time of war all of our sea-going mercantile marine will be withdrawn from commercial uses for naval and military purposes. Hence, with an insignificant mercantile marine and a comparatively strong navy, it is probable that no injury except an occasional panic with regard to our coastwise commerce will result. Our advocacy of its adoption as a national policy, formerly a matter of interest, is now purely altruistic, as we give up a weapon which may be of some importance in time of war for a principle and for the benefit of others.

With its abolition, however, is left the more important and wide-reaching war rights of blockade and the capture of contraband on the high seas. These are more important and, it will be found, more vexatious war rights, as they include within their scope of operations neutral as well as enemy ships. It is claimed, and I think with reason, that with the abolition of the right to capture enemy private vessels the tendency will be to strain the right of capture and detention of vessels for the carriage of contraband, especially as to provisions and food stuffs.

Let us now return to the question which has served as the text of this paper:

"Would immunity from capture during war of non-offending private property upon the high seas be in the interest of civilization?"

This depends upon whether the exercise of this war right makes for the prevention of war or not. If it does, it is in the interest of civilization, for prevention ranks high above amelioration of warfare.

So far as the capture of private property at sea tends to bring stress upon food supply in a radical way it tends towards peace. If a country depending upon most of its food supply by sea-borne carriage loses the command of the sea and its home waters, it is not necessary for the actual arrival of distress and starvation to create peace. The imminence of the danger, its gravity and surety, will be sufficient to make the government of the day enter into negotiations preliminary to peace. War would undoubtedly be shortened and these dangers arising from war would cause the greatest reluctance in entering into it by countries exposed to such dangers.

With respect to the other military advantages arising from the

capture of private property, the tendency from their use for shortening or prevention of war is less evident. They are, however, elements which enter into the great pressure which prevents war and shortens its duration — elements varying in nature both on land and sea, the sum of which brings about peace or prevents war. So far as they do this efficiently, and so far alone, they are in the interest of civilization.

Let us recall Von Moltke's statement of war upon land, when he says:

The greatest benefit in the case of war is that it shall be terminated promptly. In view of the end it should be permitted to use all means save those which are positively condemnable. I am by no means in accord with the Declaration of St. Petersburg when it declares that the weakening of the military forces of the enemy constitutes the sole legitimate procedure in a war. No, it is necessary to attack the resources of the government of the enemy, his finances, his railways, his provisions (stores), and even his prestige.

In these remarks he expressed, I believe, not only the view but the practice of his own country, the greatest military nation in the world as to land warfare, which is from the surrounding circumstances rarely, if ever, as humane as war upon the sea, either with respect to private persons or to private property.

C. H. STOCKTON.

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EDITORIAL COMMENT

THE JANUARY JOURNAL.

Dr. James Brown Scott, the Managing Editor of the Journal, who as one of the delegates of the United States, took part in the deliberations of The Hague Conference, has cabled directing that the announcement be made in this issue that the January number of the Journal will be devoted to the work of the conference. Discussion of topics suggested by the conference and the publication of the conventions adopted are therefore postponed until the January issue.

As a preliminary to the further discussion of the subject promised for the next number, a brief editorial comment will be found below, giving a short account of the proceedings and the work of the American delegation at the conference.¹

¹ AMERICAN DELEGATION TO THE SECOND HAGUE PEACE CONFERENCE, 1907.

Joseph H. Choate, of New York, Commissioner Plenipotentiary with rank of Ambassador Extraordinary; Horace Porter, of New York, Commissioner Plenipotentiary with rank of Ambassador Extraordinary; Uriah M. Rose, of Arkansas, Commissioner Plenipotentiary with rank of Ambassador Extraordinary; David

THE SECOND PEACE CONFERENCE OF THE HAGUE.

In the April issue of this Journal editorial notice was made of the convocation of the second peace conference of the nations at The Hague, initiated by President Roosevelt and called by the Emperor of Russia. This conference assembled at The Hague on June 15th last with a representation present of the following nations: Germany, United States of America, Argentine Republic, Austria-Hungary, Belgium, Bolivia, Brazil, Bulgaria, Chile, China, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, Spain, France, Great Britain, Greece, Guatemala, Haiti, Italy, Japan, Luxemburg, Mexico, Montenegro, Nicaragua, Norway, Panama, Paraguay, Netherlands, Peru, Persia, Portugal, Roumania, Russia, Salvador, Servia, Siam, Sweden, Switzerland, Turkey, Uruguay, and Venezuela. The arrangement of nations thus given follows the order of their titles in the French language, and was observed in the seating of the delegations, the calling of the roll, etc.

The conference was opened by an address of welcome, in the name of the Queen of the Netherlands, by Jonkheer van Tets van Goudriaan, the Minister of Foreign Affairs, and upon his nomination M. Nelidoff, Russian Ambassador in Paris, was chosen president of the conference, who, on taking the chair, made an address reviewing the work of the first conference and expressing hope for further advance in the second. W. Doude van Troostwijk of the Netherlands was chosen secretary general.

The course followed by the first conference for the consideration and dispatch of business was adopted and the conference was divided into four commissions. To the first commission were assigned the subjects of arbitration, commissions of inquiry, and all kindred questions. The second commission was given charge of the amelioration of the laws and

Jayne Hill, of New York, Envoy Extraordinary and Minister Plenipotentiary to the Netherlands, Commissioner Plenipotentiary; Brigadier-General George B. Davis, Judge Advocate General, United States Army, Commissioner Plenipotentiary with rank of Minister Plenipotentiary; Rear Admiral Charles S. Sperry, United States Navy, Commissioner Plenipotentiary with rank of Minister Plenipotentiary; William I. Buchanan, of New York, Commissioner Plenipotentiary with rank of Minister Plenipotentiary; James Brown Scott, of California, Solicitor for the Department of State, Technical Delegate and Expert in International Law; Charles Henry Butler, of New York, Reporter of the Supreme Court, Technical Delegate and Expert Attaché to the Commission; Chandler Hale, of Maine, Secretary of the Commission; William M. Malloy, Assistant Secretary and Disbursing Officer; Arthur Bailly-Blanchard, Second Secretary of Embassy, Paris, France, Assistant Secretary.

customs of war on land, the opening of hostilities, the revision of the declarations made by the first conference, and the rights and duties of neutrals. The third commission had charge of questions connected with naval warfare, such as the bombardment of towns, the use of torpedoes, the regimen of belligerent vessels in neutral ports, and the adaptation of the Geneva Convention of 1864 to sea warfare. To the fourth commission was submitted all subjects in the programme not embraced by the first three commissions, among which were the transformation of merchant vessels into ships of war, private property on the sea, the delay of favor granted to vessels on the opening of hostilities, contraband of war, blockade, destruction of neutral prizes, and the application of the provisions relative to land warfare to maritime war.

Each nation was to be represented upon all of the four commissions by such number of its delegates as it saw fit to name, and, in addition, any delegate was permitted to attend the sessions of all the commissions, and as no two of these were in session at the same time they were open to all the members of the conference. This arrangement, however, had the effect of reducing the number in attendance on the commissions, and enabled them to be assembled in a smaller hall where deliberation was more satisfactory than in the large and imposing Hall of the Knights, where the full conference had its sessions.

The chairman named for the first commission was M. Léon Bourgeois, of France; for the second, M. Beernaert, of Belgium; for the third, Count Tornielli, of Italy; and for the fourth, M. de Martens, of Russia.

The anticipation of this Journal that the Second Hague Conference would be in the widest and fullest sense of the word a world conference has been realized, as only two or three minor nations, for domestic reasons, were unrepresented. It was remarkable also in the fact that it was the first time all the nations of the world had come together in a spirit of amity to consider the general interests of mankind. While this condition was full of hope for the reign of peace and justice, it was anticipated that difficulties would be encountered in the deliberations of the conference and that on many questions there would be found conflicting, if not irremediable, differences of views and interests. In the April editorial comment it was said:

There has been much discussion as to the programme to be submitted and discussed at The Hague, for while the conference is international in its nature, nations have from the nature of things national interests, and it is a matter of great difficulty to harmonize these interests and unite upon a programme with which all may agree. The purpose of the conference is eminently practical. It is not

a parliamentary body in which motions are voted by majorities. The condition of progress is not that one nation or any few nations may take a step in advance, but that all nations may take the same step, and it is wiser to do a few things with the consent of all than to attempt many things which must necessarily meet opposition and fail of universal consent.

It is not, therefore, surprising to learn that the conference has encountered much difficulty in reaching a unanimous conclusion on a number of important subjects and that its sessions have been greatly prolonged. While the first conference completed its labors in ten weeks the second conference has extended its sittings through nearly double that length of time. But while it has failed to agree upon some propositions regarded by the majority of the nations as of great importance, it would not be just to say that its labors have resulted in little good. It was of itself a great achievement to have brought together all the nations of the earth in friendly counsel over their mutual interests and to study the best means of securing the peace of the world. But when the finished work of the conference shall be examined it will be found to have reached some important results. Some of them may be briefly cited with satisfaction:

1. The conference has perfected the method of instituting commissions of inquiry, such as that which worked so satisfactorily in adjusting the dispute between Great Britain and Russia on account of the "Dogger Banks" incident during the late Russo-Japanese war.
2. While it was not possible to secure an agreement for a definite method of interposition by the mediation of friendly powers between two nations threatening hostilities, the conference did strengthen the expression of the nations as to the desirability of resorting to that step to prevent or delay war.
3. Important amendments have been made in the treaty of arbitration of 1899, so as to make a resort to The Hague Court more easy and to improve its methods of procedure.
4. An agreement was reached respecting an international prize court of appeal, so that neutral powers and individuals may appeal their cases from the court of the belligerent to an impartial tribunal.
5. The laws and customs of war on land have been still further ameliorated in extension of the action of the first conference; the duty of belligerents in opening hostilities has been more clearly defined, as well as the rights and duties of neutrals.
6. New rules have been framed governing naval warfare and the provisions of the Geneva Convention of 1864 have been extended to it.

7. At the present writing it is not possible to state in detail the action reached on the subjects considered by the fourth commission; rules have been agreed upon regulating the transformation of merchant vessels into ships of war, some provision as to the favor to be granted to vessels in belligerent ports or on the high sea in the breaking out of hostilities, the exemption of fishing vessels from seizure, the restriction of the search of mail vessels, and other favors to neutral commerce.

8. Probably the most important work of the conference, for the nations of America at least, will be the prohibition of the forcible collection by governments of contractual claims of their subjects against other governments, when the latter are willing to submit the justice and amount of the claims to arbitration. This subject was early brought before the conference by the delegation of the United States and met with little opposition on the part of the great powers of Europe. The Latin-American states, however, while favoring the general proposition, were unwilling to recognize even by inference the right of a foreign power to intervene in its domestic affairs and override the action of its courts of law. After considerable discussion a formula was agreed upon which, under reservation, was accepted by these states. This matter has been the occasion of many of the hostile operations of European nations against the governments of Latin America and was brought to the attention of the world by the warlike operations of the fleets of Great Britain, Germany, and Italy against Venezuela in 1902. It is anticipated that the adoption of the provision as to debts by the conference will remove much of the friction between certain of the European governments and those of Latin America.

The measures adopted by the conference thus briefly reviewed have been embodied in a series of conventions, declarations, and *vœux*. The conventions are as follows:

- I. Convention for the pacific settlement of international conflicts.
- II. Convention relative to the recovery of contractual debts.
- III. Convention relative to the opening of hostilities.
- IV. Convention concerning the laws and customs of war on land.
- V. Convention concerning the rights and duties of neutral powers and persons in land warfare.
- VI. Convention regarding the treatment of enemy's merchant vessels at the beginning of hostilities.
- VII. Convention regarding the transformation of merchantmen into warships.
- VIII. Convention in regard to the placing of submarine mines.

IX. Convention concerning bombardment by naval forces in time of war.

X. Convention for the adaptation of the principles of the Geneva Convention to maritime war.

XI. Convention with regard to certain restrictions upon the right of capture in maritime war.

XII. Convention regarding the establishment of an international prize court.

XIII. Convention concerning the rights and duties of neutral powers in maritime war.

The conference also adopted a declaration regarding the prohibition of throwing projectiles and explosives from balloons, which will be embodied in a separate act.

Moreover, the conference adopted the so-called Tornielli declaration, which favored the principle of obligatory arbitration as applied to certain subjects, and a resolution declaring that it is highly desirable that the powers consider the limitation of military burdens.

Finally, the conference adopted unanimously the following *vœux*:

I. Recommending the project of a court of arbitral justice.

II. Recommending that the civil and military authorities of belligerent states make it their special duty to insure the maintenance of peaceful commercial relations between the peoples of the belligerent states and of neutral countries.

III. Recommending conventional agreements defining the military duty due from resident aliens.

IV. Recommending the consideration of the laws of maritime war by a future conference and meanwhile suggesting the application, so far as possible, of the principles of the Convention relative to land warfare.

And finally, the conference adopted a recommendation with regard to the meeting of the future conference after a period of time (eight years) similar to that which has elapsed since the first conference of 1899, and notifying the powers to make adequate preparation for the next conference by means of an international committee.¹

The conference closed its labors on October 18, and such delegations as had the authorization of their governments attached their names to the treaties, among which were the delegates from the United States. The right to sign the treaties will be open until June 30, 1908, and it is

¹ A recommendation, although once voted by the Conference, was finally rejected, concerning contribution of materials and works of art to the Peace Palace at The Hague.

expected that all the nations, with few exceptions, will become parties to them.

At the final session congratulatory telegraphic messages were authorized to be sent to President Roosevelt who initiated the conference, to the Emperor of Russia who convoked it, and to the Queen of Holland for its hospitable entertainment. In view of the concord with which it terminated its sessions and of the list above given of accomplished acts of the conference, it must be admitted that its work, however imperfect it may be, will prove of great value to the world.

The delegation of the United States has the distinction of having presented and urged more important propositions than any other delegation. One of these, that against the forcible collection of debts, accepted by the conference, has already been noticed. The second proposition was the exemption of private property at sea from capture and confiscation by the belligerents. The position of the United States on this measure has been in uniform advocacy of it from the very foundation of the Government. Franklin advanced it when minister in Paris and secured its incorporation into our first treaty with Prussia in 1785. Its adoption by the nations has been urged by various of the Presidents. It was proposed by Secretary Marcy as an amendment or a natural addition to the four rules of the Declaration of Paris of 1856. It was brought before the first peace conference in 1899 by the American delegation, but was not acted upon because it was not included in the programme.

As it was expressly included in the programme of the second peace conference, a proposition covering the subject was early presented by the delegation of the United States in these terms:

The private property of all citizens or subjects of the signatory powers with the exception of contraband of war shall be exempt from capture or seizure on the sea by the armed vessels or by the military force of any of the said signatory powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said powers.

On submitting the proposition it was ably supported by a speech from Mr. Choate, the first delegate, reviewing the history of the question and giving the reasons with which the United States supported it. In closing he said:

We appeal then to our fellow delegates assembled here from all nations in the interests of peace, for the prevention of war and the mitigation of its evils, to take this important subject into consideration, to study the arguments that will be presented for and against this proposition, which has already enlisted the sympathy and support of the people of many nations, to be guided not wholly

by the individual interest of the nations they represent, but to determine what shall be for the best interest of all the nations in general, and whether commerce, which is the nurse of peace and international amity, ought not to be preserved and protected, although it may require from a few nations the concession of the remnant of an ancient right, the chief real value of which has long since been extinguished.

In the consideration of such a question the interests of neutrals, who constitute at all times the great majority of the nations, ought to be first considered, and if they will declare on this occasion their adhesion to the humane and beneficent proposition which we have offered, we may rest assured that, although we may fail of unanimous agreement, such an expression of opinion will represent the general judgment of the world and will tend to dissuade those of us who may become belligerents from any future exercise of this right which is so abhorrent to every principle of justice and fair play.

The proposition was debated at great length, the British delegation leading the opposition. Among the most effective arguments advanced by the opposition were the views of Captain Mahan of the American Navy, who, just on the eve of the meeting of the conference, contributed an article to an English magazine combatting the position of the United States and strongly supporting the British attitude on the subject. When the vote was taken, twenty-one nations were recorded in favor of the proposition of the United States and eleven against it, among the latter being France, Great Britain, Japan, and Russia. Although the vote showed the gratifying fact of a decided majority of the nations in favor of the American proposition, the powerful countries found in the minority made it unadvisable to press it further upon the conference.

The third subject introduced by the delegation of the United States was a proposition for obligatory arbitration, which provided that all questions of a judicial nature or relating to the interpretation of treaties, which it was not possible to settle by diplomacy, should be referred to the permanent court of arbitration at The Hague, provided that they did not affect the vital interests, the independence, or the honor of the contracting states. The proposition was similar to the series of treaties made by Secretary Hay with various governments in 1904, except that it provided that each agreement for arbitration should be ratified in each country in accordance with its constitutional requirements, thus obviating the objection raised by the Senate against the treaties of 1904.

This proposition seemed at first to be destined to receive the practically unanimous support of the conference, but before the close of the sessions the German delegation assumed an attitude of hostility. It claimed that Germany was in favor of the general principle of obligatory arbitration for certain classes of cases, but declared its unwillingness to enter into a

single and general treaty of arbitration with all the nations of the world under the scheme proposed by the United States. Baron Marschall, in the name of his delegation, stated, as evidence of the sincerity of its attachment to arbitration, that Germany had made already special treaties of arbitration with twenty powers, and he expressed a preference for agreements between individual governments. After prolonged and animated debates the vote on the American proposition, somewhat amended, resulted in thirty states in the affirmative and six in the negative, the only important powers voting in the opposition being Germany and Austria-Hungary. The friends of obligatory arbitration being thus disappointed in their effort to secure unanimity, had to content themselves with a general declaration adopting it in principle. The result is likely to be that the nations will largely extend the scope of arbitration by separate treaties between the various powers, similar to the many already in existence, so that the agitation at The Hague in the end may produce good results.

The fourth important proposition submitted to the conference was a scheme for a permanent court of arbitration. In the first instance the scheme contemplated a tribunal composed of fifteen judges, to be chosen for a long period of years, and to hold regular terms of the court at The Hague and to remain in session there as long as business required their attendance. In laying the subject before the conference Mr. Choate explained its provisions, set forth the desirability of a permanent court composed of the same judges, and closed with the following appeal:

Mr. President, with all the earnestness of which we are capable, and with a solemn sense of the obligations and responsibilities resting upon us as members of this conference, which in a certain sense holds in its hand the fate and fortunes of the nations, we commend the scheme which we have thus proposed to the careful consideration of our sister nations. We cherish no pride of opinion as to any point or feature that we have suggested in regard to the constitution and powers of the court. We are ready to yield any or all of them for the sake of harmony, but we do insist that this great gathering of the representatives of all nations will be false to its trust, and will deserve that the seal of condemnation shall be set upon its work, if it does not strain every nerve to bring about the establishment of some such great and permanent tribunal which shall, by its supreme authority, compel the attention and deference of the nations we represent, and bring to final adjudication before it differences of an international character that shall arise between them, and whose decisions shall be appealed to as time progresses for the determination of all questions of international law.

Let us then, Mr. President, make a supreme effort to attain not harmony only, but complete unanimity in the accomplishment of this great measure, which will contribute more than anything else we can do to establish justice and peace on everlasting foundations.

The commission will distinctly understand that our proposed court, if established, will not destroy, but will only supplement the existing court established by the conference of 1899, and that any nations who desire it may still resort to the method of selecting arbitrators there provided.

Gentlemen, it is now six weeks since we first assembled. There is certainly no time to lose. We have done much to regulate war, but very little to prevent it. Let us unite on this great pacific measure and satisfy the world that this second conference really intends that hereafter peace and not war shall be the normal condition of civilized nations.

When the subject came to be discussed there was a general concurrence as to the desirability of a permanent court such as was proposed in the American scheme, although there were quite a number of members of the conference who preferred the method of organizing a court for each particular case, as provided in the treaty of 1899. But when the manner of constituting the permanent court and the election or choice of its members was taken up for consideration, an almost hopeless contrariety of views was developed. It was apparently unwise to enlarge the court so as to give each nation a representative on it, and few of the states were found ready to yield this claim to representation under any method which could be devised for its composition.

The delegation of the United States, after great difficulty and much discussion, obtained at the last moment a unanimous recommendation that the project (consisting of thirty-five articles) for the establishment of a court of arbitral justice be submitted to the powers and put into operation as soon as a method of appointing the judges be agreed upon.

While it is a source of deep regret that some great projects so ably and persistently urged by the delegation of the United States, failed of success, it is a matter of satisfaction that some important and useful steps have been taken by the conference towards the amelioration of the horrors of war, the greater protection of neutrals, and the promotion of peace among the nations. We must look forward to the interval which will occur before the next conference shall be assembled as a period of discussion and education, in the hope that the nations will then be prepared to consider with greater unanimity the important measures which failed of realization at the second peace conference.

Finally, it may be noted that when the records of the conference are examined it will be found that some progress has been made in the development and establishment of the principles of international law. The long and exhaustive debates which have occurred in the conference between the ablest publicists of the world on the practical application of

legal principles and on the duties of states in their international relations, will be fully reported, and their careful examination cannot fail to enlighten the student of international law.

THE INTEGRITY OF CHINA AND THE "OPEN DOOR."

The traditional policy of China, from time immemorial, has been that of a closed door — China for the Chinese. Against it, for the last half century, has stood the foreign policy as regards China, viewed by Chinese eyes as one of aggression and invasion by the several powers, each acting for itself, without concert but rather in rivalry, each bent on gaining advantage for itself in trade and influence, and each aiming to close more or less extended areas of China to all influences save its own. In the earlier stages this policy was carried out by the simple process of gaining a local foothold through cession or annexation; in its later stages it evolved the less material expedients of leaseholds, and spheres of influence, so called, radiating from the primary establishments and expanding their exclusive privileges over indeterminate regions of China proper.

The cession of the island of Hongkong to Great Britain in 1842 was the initial step, followed in 1860 by the cession of adjacent territory on the mainland. Like Macao, which had been granted to the Portuguese in 1586 in consideration for the efforts of Portugal to suppress piracy, Hongkong was made an exclusive colony, governed by the laws and regulations of the parent state.

In 1858 Russia acquired a large part of Amur, and in 1860 gained the whole coast of Manchurian Tartary, from the mouth of the Amur to the frontier of Korea, embracing the strategic naval port of Vladivostok, following up these acquisitions in 1881 by annexing the western part of the Ili country.

In 1862 France occupied part of Cochin China, a feudatory of the Chinese Empire, and in 1867 annexed more of its territory. The subsequent expansion of the French settlements northward into Tongking, a part of the feudatory State of Annam, resulted in the Franco-Chinese war, which was ended by the treaty of peace of 1885 whereby Annam was enabled to negotiate with France for the cession of Tongking.

The war between China and Japan terminated by China's recognition of the complete independence of Korea, theretofore a tributary of the Empire, and by the cession to Japan of the southern part of the Province of Feng-tien (southern Manchuria), with its appurtenant islands in the Bay of Liao Tung and in the northern part of the Yellow

Sea, besides the cession of the Formosan islands and the Pescadores group. (Supplement, p. 378.) Subsequently, however, through the interference of Russia, Germany, and France, Japan was persuaded to retrocede to China the Feng-tien territory and its islands, by the convention of November 8, 1895. (Supplement, p. 384.)

These several acts of dismemberment inured to the exclusive benefit of the acquiring state. Sovereignty and administration passed to the foreign power with each successive alienation of imperial territory. The result was merely local, one absolute control supplanting another. The vast bulk of China remained sealed to foreigners. Each change of borders shifted the closed doors of China on the one hand, and on the other replaced them by other doors of alien privilege almost equally closed. Nevertheless, the process of dismemberment seemed to be checked, for a time at least. Any fresh attempts of other powers to acquire Chinese territory would naturally be opposed by the rival powers already in possession. Indeed, such a contingency was in several cases expressly guarded against. By her treaties with France in 1897 and 1898, with Great Britain in 1897, and with Japan in 1898, China made explicit declarations as to the non-alienation of neighboring territory. It remained to devise some practical expedient by which the material benefits of territorial acquisition could be enjoyed without resort to positive annexation.

The germ of the new foreign movement upon the hitherto unassailable interior country is found in the settlement effected in 1897 between Great Britain and China relative to the anomalous regions near the "buffer" territory of Upper Burmah. By the treaty of February 4, 1897, Great Britain agreed to recognize certain defined territory as belonging to China, with the important qualification that "in the whole of this area China shall not exercise any jurisdiction or authority whatever. The administration and control will be entirely conducted by the British Government, who will hold it on a perpetual lease from China;" while China in turn agreed not to cede to any other power certain other lands in the same general locality. Besides this enunciation of the theory of territorial acquisition by leasehold tenure, an effective implement stood ready to hand in the theory of spheres of paramount influence. This latter expedient, which already had existed in practice in other quarters, found its earlier application in China in the opening of the Yangtze Valley to commerce by the British in 1860 and 1876, and by the establishment of British lines of steamers on the river, whereby British trade became virtually predominant in that extensive

region. In fact, Great Britain utilized the Yangtze Valley as a rightful natural thoroughfare to her eastward Indian possessions, and by so doing aided to develop the commerce and resources of the valley, thus benefiting China scarcely less than England. The term "sphere of influence" became the common mode of expressing the relation of Great Britain to the whole of the Yangtze Valley and its adjoining provinces. The position of England in this regard was, later, emphasized by an exchange of identic notes between the United Kingdom and Russia under date of April 28, 1899, by which, in return for the British assurance of noninterference with Russian railway projects to the north of the great wall of China, "Russia, on her part, engages not to seek for her own account, or on behalf of Russian subjects or of others, any railway concessions in the basin of the Yangtze, and not to obstruct, directly or indirectly, applications for railway concessions in that region supported by the British Government." (Brit. and For. State Papers, Vol. XCI, pp. 91-94.)

About this time—in November, 1897—the murder of two German missionaries by Chinese in the Province of Shantung was followed by a German naval demonstration in force to compel redress for the injury. The Bay of Kiao-chou was occupied by the Germans. The settlement which followed embraced the signature of a treaty on March 6, 1898, by which China "cedes to Germany on lease, provisionally, for ninety-nine years," both sides of the entrance to the Bay of Kiao-chou; besides granting specific privileges in a zone of 50 kilometers (100 Chinese li) around the bay, and conceding exclusive rights to a system of German railways and to German mining enterprises in the Province of Shantung. This effectively established a German sphere of influence over the major part of that province.

The example set by Germany in thus acquiring control of a valuable strategic harbor and large privileges in the neighboring territory was not lost upon other powers having important interests in the Far East. While the German negotiations were in progress, Russia was making a successful countermove. Three weeks after the signature of the Kiao-chou lease, a convention between Russia and China was signed at Peking, by which Russia obtained a lease, for twenty-five years, renewable, of Port Arthur and Talienwan, with a large defensible tract of land embracing the southern extremity of the Liao-tung Peninsula, and the right to fortify Port Arthur as a naval station. The treaty comprised the privilege of extending a branch line of the Chinese Manchurian Railway to Talienwan and to another unspecified point on the

Liao-tung Peninsula. This latter concession was soon afterwards, by an agreement signed at St. Petersburg May 7, 1898, changed to a grant for the construction of a branch line of the Russian Siberian Railway to Talienwan; and by the same instrument the remainder of the peninsula was made neutral ground, closed to the occupancy of mining industries and trade of any other power. It is a curious fact that the official text of these two Russo-Chinese conventions has never been published by either party.

France and Great Britain were at the same time operating on similar lines in quest of defensible naval stations. On April 10, 1898, China agreed to a convention with France for a ninety-nine year lease of a naval and coaling depot at Kuang-chou-wan, near the strait of Hai-nan, in the most southerly part of the Empire, convenient to the French establishments in Tongking, with the usual exclusive privileges in the adjacent territory. This convention is, however, of merely parenthetical interest, as it was not perfected by ratification until January, 1900, and its influence upon the national sentiment of China was not apparent.

The most important countermove to offset the large naval advantages gained by Germany and Russia was made by Great Britain, on the most commanding site on the Shantung Peninsula, midway between the acquisitions of Germany and Russia and nearly facing Port Arthur. On July 1, 1898, an Anglo-Chinese convention was signed at Peking by which there was leased to Great Britain as a naval harbor, "for so long a period as Port Arthur shall remain in the occupation of Russia," the bay and islands of Wei-hai-Wei with a circumjacent belt of land ten miles in width, besides giving the right to fortify a part of the neighboring Shantung coast. It may be noted that this lease was in its terms purely for strategic purposes and carried no commercial or influential privileges. In this regard the German sphere of influence in the Province of Shantung was respected. By a declaration signed April 19, 1898, Great Britain formally gave assurance to Germany "that in establishing herself at Wei-hai-Wei she has no intention of injuring or contesting the rights and interests of Germany in the Province of Shantung or of creating difficulties for her in that province." (Blue Book, China, No. 1, 1899, pp. 27-31.)

The lodgments so effected by three great naval powers of Europe commanded the approaches to the Gulf of Peh-chi-li and virtually sealed the normal path of access to Tientsin and thence to Peking itself. No purpose of favoring the welfare of the Chinese people was announced.

Each succeeding foreign lease cut off Chinese territory from open commerce, without offering compensating advantages to the near-by country. To the Chinese mind the course of the foreign nations antagonized the traditional policies of China. It foreshadowed further dismemberment. It was calculated to confirm and embitter the anti-foreign feeling, and crystallize it into a national sentiment of chauvinism. Looking at the situation in this light it is hardly surprising that manifestations hostile to all foreigners should occur in the provinces most affected by the foreign occupation. The antagonism was made easier of development by the tendency of the Chinese to band together in secret organizations. Most formidable among these was the Boxer society, whose emblem was a clenched hand, and its name the Society of Righteous Harmony. Ostensibly innocent in character, its thinly veiled purpose was the extermination of foreigners and native converts to alien creeds. It rapidly increased in numbers and potency until the northern tier of provinces felt its influence. It first showed its power in Shantung, the same province in which its hostility to German missionaries had precipitated the German occupation of Kiao-chow two years before. In October, 1899, the Boxer uprising began. Subdued at first, the Boxers rallied, and by December their attacks terrorized many of the missionary establishments in Shantung. On January 1, 1900, the British missionary Brooke was murdered near Tainanfu. Other outrages followed. By March the Boxer movement had spread more alarmingly, and its members were openly organizing and drilling throughout northern China. The foreign ministers at Peking joined in calling upon the Chinese Government to suppress the Boxers and their associates, the Big Swords. The mildly deprecatory measures of the Tsungli-Yamen were ineffectual. The Government of the United States detailed war ships to Chinese waters to protect American interests. Other naval powers did the same, until a mixed fleet was gathered at Taku, the port of Tientsin. By May the victims of the Boxers, foreigners and native converts, were numbered by hundreds. The situation at Peking had grown so alarming that the foreign legations urgently called for defensive guards. On June 1, three hundred and fifty English, Russian, French, German, Italian, and American marines reached Peking, barely in time. By the 4th, the Boxer forces were pillaging and killing up to the walls of the capital. On June 11, the chancellor of the Japanese legation was murdered at the city gate. By this time the Chinese troops in Peking had sided with the Boxers. The legations were practically besieged and all communication with the outside world was cut off.

Attempts by the foreign commanders at Taku to relieve the beleaguered legations failed. Their first step was one of direct hostility. Taku was shelled and its forts stormed after a stubborn defense by Chinese troops. The expedition under Admiral Seymour fought its way a short distance towards Peking, and returned to Taku.

The interested powers thereupon proposed a concerted armed movement, to relieve their countrymen and secure reparation. The perilous situation of the legations in Peking called for instant and energetic action. The question was, how to act, without drifting into war with all China. As yet, the anti-foreign movement was conspicuous only in the northern provinces. An incautious step might inflame the central and southern parts. In some quarters there seemed to be a disposition to treat the Chinese Government as an enemy, in sympathy, if not in collusion, with the Boxers. The United States inclined to regard the movement as a local rebellion beyond the control of the Chinese Government. On the 22d of June, Minister Wu communicated to Secretary Hay the important declaration that the five southern provinces were at peace and that their viceroys were able and determined to protect foreigners, for which reason they asked that the powers should make no protective demonstration in that quarter. Mr. Hay replied on the same day that the United States had no disposition to send either military or naval forces into Chinese provinces where the Government showed ability and determination to preserve order and protect the lives and rights of foreigners. This view was communicated to the interested powers and was shared by them. Events fully justified the reliance thus placed on the loyalty of the southern viceroys. No disturbance occurred in their five populous provinces. The issue was confined to the north, and the contingency of a general belligerent invasion of China by allied armies was eliminated. The question was narrowed to the rescue of the besieged legations. It remained to be determined whether the efforts of the powers to this end should be in the nature of an alliance hostile to China or be in aid of the Chinese Government and so conducted as to tend to relieve the Chinese of the rooted apprehension that their national existence stood in peril from foreign designs of aggression, subjugation, and dismemberment.

The powers consulted the United States as to the course to be pursued. The views of the American Government were expressed in a note to the French chargé d'affaires, dated July 3, 1900, in which Mr. Hay said:

Following the precedents enunciated by the United States as early as 1857, this Government aims at the conservation of peace and amity with the Chinese

nation, the furtherance of lawful commerce, and the protection of the lives and interests of American citizens in every part of China by all the means guaranteed under extraterritorial treaty rights and by the law of nations, to which ends we are prepared to uphold the efforts of the Chinese authorities in the provinces to use their powers to protect foreign life and property against the attacks of subversive anarchy, and are resolved to hold to the uttermost accountability the responsible authors of any wrong done to our citizens. To attain these objects the Government of the United States is now, as heretofore, ready to act concurrently with the other powers in opening up communication with Peking and rescuing the imperiled Americans and foreigners there, to afford all possible protection everywhere in China to American life and property, to guard all legitimate American interests in the Empire, and to aid in preventing a spread of the disorders to other provinces and in securing future immunity from a recurrence of such disasters—seeking to these ends a solution which may bring about permanent peace and safety to China, preserve Chinese territorial and administrative entity, protect all rights guaranteed to friendly powers by treaty, and safeguard for the world the principle of equal and impartial trade with all parts of the Chinese Empire.

These views were communicated to all the interested powers by Mr. Hay's telegraphed circular note of July 3, 1900. (Supplement, p. 386.) They proved to be pivotal. The powers promptly responded in like sense, whereupon a concerted relief expedition was organized, composed of such forces as the interested powers could muster at Taku, and dispatched to Peking. The effort succeeded and the story of its achievement has passed into history.

As indicating the cordial acquiescence of the powers in Mr. Hay's proposals of July 3, it is pertinent to cite the declaration made by the German Foreign Secretary, Count von Bülow, on July 11, to the several federated governments of the Empire. He said:

The end for which we are striving is the restoration of safety to the persons, property, and enterprises of German subjects in China, the rescue of foreigners shut up in Peking, the revival and assurance of order under an organized Chinese Government, and expiation and indemnity for the acts committed. We desire no partition of China; we are striving for no special advantages. The Imperial Government is fully convinced that the maintenance of the understanding among the powers is the preliminary requirement for the restoration of peace and order in China, and will, for its part, continue to consider this as of the first importance.

The immediate necessities of the situation having been met, Mr. Hay hastened to reemphasize the vital proposals of his circular note of July 3, 1900. On the 6th of September following, the American ambassadors to France, Germany, Great Britain, and Russia were instructed to

acquaint the Governments to which they were respectively accredited with the desire of the United States that they should severally make formal declaration of an "open door" policy in the territories held by them in China, and give assurance that within their respective "spheres of influence" all nations should enjoy perfect equality of treatment for their commerce and navigation. All the interested powers made cordial response.

One of the earliest statements of the policy thus adopted by the powers is found in the formal agreement signed in London by the British premier, Lord Salisbury, and the German ambassador, Count von Hatzfeldt, on October 16, 1900 (Supplement, p. 387), which declared:

1. It is a matter of joint and international interest that the ports on the rivers and littoral of China should remain free and open to trade and to every other legitimate form of economic activity for the nationals of all countries without distinction; and the two Governments agree on their part to uphold the same for all Chinese territory as far as they can exercise influence.

2. Her Britannic Majesty's Government and the Imperial German Government will not, on their part, make use of the present complication to obtain for themselves any territorial advantages in Chinese dominions, and will direct their policy towards maintaining undiminished the territorial condition of the Chinese Empire.

3. In case of another power making use of the complications in China in order to obtain under any form whatever such territorial advantages, the two contracting parties reserve to themselves to come to a preliminary understanding as to the eventual steps to be taken for the protection of their own interests in China.

The settlement effected with China by the cooperating powers, by the final protocol of September 7, 1901 (Supplement, p. 388), while dealing with the questions of reparation for the Boxer outrages, the security of legations in Peking, the protection of foreigners in the Empire, and the commercial relations of China to the treaty powers, was silent in regard to the territorial problems. Those remained to be determined by special agreements.

The next authoritative step in formulating the doctrines of Chinese territorial and administrative integrity and the "open door" was taken in the agreement of alliance between Great Britain and Japan, signed at London January 30, 1902 (Supplement, January, 1907, p. 14), wherein they declared themselves to be "specially interested in maintaining the independence and territorial integrity of the Empire of China and the Empire of Korea, and in securing equal opportunities in those countries

for the commerce and industry of all nations," and to be "entirely uninfluenced by any aggressive tendencies in either country."

Fortified by this potential alliance, and acting in behalf of her own interests, Japan exerted all possible influence with China to bring about a conventional understanding with Russia in regard to Manchuria. The negotiation then set a-foot was far reaching in its consequences. China had stronger motives than Japan to undo the virtual appropriation of southern Manchuria by the Russians. Their influence had spread beyond the limits traced by the Convention of 1898, and not alone the neutral territory of Liao-tung, but the whole country to the Siberian border had passed from Chinese to Russian control. Niuchwang and other ports were practically Russianized. On the Yalu, Russian influence faced the policies of Japan in Korea. The situation was fraught with peril. On March 20-April 8, 1902, China signed with Russia an agreement for the reestablishment of the authority of the Chinese Government in Manchuria, and the gradual evacuation of the territory by the Russians within three periods of six months each. Russia's nonwithdrawal precipitated the Russo-Japanese war. Its result tended to accentuate the policies of the "open door" and of respect for the sovereignty and integrity of China. By the third article of the Treaty of Portsmouth, September 5, 1905, between Japan and Russia (Supplement, January, p. 17), the parties mutually engaged "to entirely and completely restore to the exclusive administration of China" all parts of Manchuria then occupied by either belligerent; while Russia declared that it had no territorial advantages or preferential or exclusive concessions in Manchuria of such a nature as to impair the sovereignty of China or which are incompatible with the principle of "equal opportunity" — *i. e.*, the open door. By Article IV "Russia and Japan mutually pledged themselves not to place any obstacles in the way of general measures which apply equally to all nations and which China might adopt for the development of commerce and industry in Manchuria."

The latest conventional phase of these closely allied questions is shown by the recent negotiation of conventions between Russia and Japan, July 30, 1907 (Supplement, p. 396), and between Great Britain and Russia, signed August 31, 1907 (Supplement, p. 398), both looking to the maintenance of the *status quo* in Eastern Asia. In both of these, the obligation to respect the territorial and administrative integrity of all existing sovereignties in the Far East, and to promote in those quarters the fullest application of the principle of the "open door" for all nations, is announced and assumed.

The old-time policies of Chinese reclusion and foreign aggression and special privilege have been reversed and limited, to the advantage alike of China and the world.

THE NORTHEASTERN FISHERIES QUESTION.

The proposed submission to arbitration of the questions in dispute under the fishery provisions of the Treaty of 1818 marks an important and hopeful development in the northeastern fisheries controversy.

From the outset there has been a wide divergence of view between the United States and Great Britain as to the meaning and effect of the fishery provisions of this treaty. Questions have arisen not only as to the extent of the rights and obligations of the American fishermen in the Canadian and Newfoundland waters affected by the treaty, but also as to the extent of the treaty waters themselves. Canada and Newfoundland have invariably so interpreted the treaty as to exclude or render worthless the fishing privileges claimed under it as a matter of right by the United States, and their admitted purpose has been to compel the United States to grant trade concessions as the price of the enjoyment of such privileges. Under the circumstances it can hardly be expected that the United States would grant the trade concessions demanded as the price of better treatment. The reciprocal agreements entered into from time to time for new and more extensive fishery privileges and trade concessions, in which the fishery privileges of this treaty have been merged, have always proved unsatisfactory and short lived. Experience has shown that a permanent settlement of this dispute by such methods is now a practical impossibility. It is evident, therefore, that, in order to arrive at any final adjustment, the rights of the respective parties under this treaty must first be ascertained, and for that purpose resort to arbitration must be had. A just and substantial basis will thus be established for the exchange of such additional privileges as may be desired on such terms as may be mutually agreeable.

The terms of the new *modus vivendi* relating to the fisheries in the treaty waters of Newfoundland, entered into pending the submission of the entire controversy to arbitration, and the diplomatic correspondence on the subject between the British and United States Governments will be found at pages 349 to 377 of the Supplement to this number.

It will be observed that the new *modus vivendi* differs from that of last year in the omission of the provision permitting the use of purse seines by the American fishermen, and the addition of the provisions

for reopening the question in order to consider any changes which may be agreed upon locally between the Newfoundland authorities and the American fishermen, and which are acceptable both to the United States and Great Britain.

SECRETARY ROOT'S VISIT TO MEXICO.

The visit of Secretary Root to Mexico in October was the logical complement of his journey around South America in 1906. He had visited the Republics of Brazil, Argentina, Chile, and Peru, aside from making brief stops in Uruguay, Panama, and Colombia. He had been able to view with his own eyes the political, economic, and social conditions of the South American continent, and to mingle with its representative statesmen, but he could hardly have formed a thoroughly comprehensive idea, first hand, of Latin America without seeing Mexico and meeting her leading men. In considering our sister republics we ought not to forget that ten of the twenty are in North America, or closer to it than to South America. Among these ten, Mexico has a population, wealth, and commerce equal to the other nine.

The interest of Mr. Root in Latin America is not a sudden development. Long before he assumed the duties of Secretary of State, and while Secretary of War, he became thoroughly acquainted with the politics and people of Cuba, through practically administering its affairs for three years, visiting the island frequently and finally establishing the Cuban Government. As he was, therefore, familiar with Cuba and could not possibly absent himself from Washington long enough to call upon the other Republics of the Caribbean or upon those of Central America, it was fitting that he should accept the invitation of President Diaz and select Mexico to complete his pan-American journeys. When the Secretary of State returned to Washington he had established an unprecedented record of official traveling in foreign lands for the purpose of better equipping himself as Minister for Foreign Affairs. No other government has such peculiar associations with its neighbors as the United States enjoys with the twenty Latin American republics of the Western Hemisphere. Whether these have confidence in the policies of the United States and work with it or against it for the general good of all depends much upon the personal interest and attitude of the Secretary of State of the United States, and it does not take long for the statesmen, press, and people of our sister nations to find out whether the man himself who directs the foreign policy of the United States is in sympathy with them or not.

If Secretary Root had concluded his study of Latin America with his visit to South America, and had omitted Mexico, he would have failed to see actually, and therefore to grasp thoroughly, the material, administrative, and general possibilities of the Latin American peoples as a whole. While the achievements and progress of South America have been notable and have excited the admiration of the world, Mexico has advanced along special lines and has had a peculiar history which makes it stand apart from the others as an interesting and instructive field of study. In no other foreign country has American capital invested so much money as in Mexico. No other foreign land, with the possible exception of the Canadian portion of Great Britain, has more questions of interest in common with the United States, and no other nation of the Western Hemisphere has had such a unique and forceful character for so long a time at its head as Mexico has known in the person of General Diaz. There is in Mexico City a coterie of intellectual men and legal minds that rank well with those of the other leading capitals of the world. With all these conditions Secretary Root came into contact by going to Mexico, and, above all, he had the opportunity, so fortunate for any Minister for Foreign Affairs, of studying and understanding the questions of a neighboring country from its own standpoint and in its own home environment. As long as Mr. Root remains Secretary of State there will be a feeling not only in South America, but in Mexico and all Latin America, that he looks upon their own problems and their relations with the United States with both sympathy and practical knowledge.

The newspapers of the United States have not exaggerated the enthusiasm, warmth, and magnificence of the reception which was accorded to the Secretary of State in Mexico, while the Secretary himself has, from natural diffidence, hesitated to describe in detail, upon his return to the United States, how he was received and treated by the Mexican Government and people. All those, however, who followed the Mexican newspapers were impressed with the greatness and sincerity of the welcome given him by the Mexican Government and people. The American people, in turn, should feel grateful to those of Mexico for the honor the latter showed to their Secretary of State.

Perhaps there was no more important occasion, among the many gatherings in honor of the Secretary, than the extraordinary session of the Mexican Academy of Jurisprudence and Legislation, which presented him with a special diploma. It is therefore fitting that there

should be reproduced in the columns of the "American Journal of International Law" the speech which Mr. Root delivered in reply to the address of Mr. Casasus, the President of the Academy:

REPLY OF HONORABLE ELIHU ROOT UPON THE PRESENTATION OF DIPLOMA BY THE
MEXICAN ACADEMY OF JURISPRUDENCE AND LEGISLATION OF
MEXICO, OCTOBER 4, 1907.

Mr. President, Mr. Casasus, and Gentlemen of the Academy:

I am highly appreciative of the very great honor which you have now conferred upon me. It is all the more grateful to me that in the ceremony which makes me an associate of this distinguished body, so prominent a part should be taken by a gentleman who, as the representative of Mexico in the capital of the United States, has not only taught me to admire his rare intellectual ability, but has won from me, by the grace and purity of his character, the warmth of friendship which adds especial pleasure to every new association with him into which I can enter. I feel, sir, that the compliment which you have paid to this little work of mine, produced without any idea that it should receive so distinguished an honor or find its way so far from home, I must ascribe rather to friendship than to any intrinsic merit of the work; but I thank you and I am most appreciative of the honor that you do me in causing it to be translated into Spanish and making it the subject of your resolution.

Circumstances have not permitted and do not permit that I should present to the Academy any thesis or discussion adequate to be associated with the admirable and well-considered papers which have been read by Mr. Casasus and yourself. I wish, however, in addition to expressing my thanks, to indicate in a few words the special significance which this Academy and my new association with it seem to me to have. We are passing, undoubtedly, into a new era of international communication. We have turned our backs upon the old days of armed invasion; and the people of every civilized country are constantly engaged in the peaceable invasion of every other civilized country. The science, the literature, the customs, the lessons of experience, the skill, the spirit of every country, exercise an influence upon every other. In this peaceful interchange of the products of intellect, in this constant passing to and fro of the people of different countries of the civilized world, we find in each land a system of law peculiar to the country itself, and answering to what I believe to be a just description of all law which regulates the relations of individuals to each other, in being a formulation of the custom of the civil community. These systems of law differ from each other as the conditions, the customs of each people differ from those of every other people. But there has arisen in recent years quite a new and distinct influence producing legal enactment and furnishing occasion for legal development. That is the entrance into the minds of men of the comparatively new ideas of individual freedom and individual equality. The idea that all men are born equal, that every man is entitled to his life, his liberty, and the pursuit of happiness; the great declarations of principle designed to give effect to the fundamental ideas of liberty and equality, are not the outcome of conditions or customs of any particular people, but they are common to all mankind.

Before the jurists and lawyers of the world there lies the task of adapting each special system of municipal law to the enforcement of the general principles which have come into the life of mankind within so recent a time, and which are cosmopolitan and world wide and belong in no country especially. These principles have to be fitted to your laws in Mexico and our laws in the United States, and to the French laws in France and the German laws in Germany, and the task before the jurists and lawyers of the world is to formulate, to elaborate, to secure the enactment and enforcement of such practical provisions as to weld together in each land the old system of municipal law, which regulates the relations of individuals with each other in accordance with the time-honored traditions and customs of the race and country, and these new principles of universal human freedom. Now, that task is something that cannot be accomplished except by scientific processes, by the study of comparative jurisprudence, by the application of minds of the highest order in the most painstaking and practical way. In the adaptation of these new ideas common to all free people, the best minds of every people should assist every other people and receive assistance from every other people. The study of comparative jurisprudence, apparently dry, purely scientific, is as important to the well being of the citizen in the streets of Mexico or Washington as those scientific observations and calculations which seem to be purely abstract have proved to be to the mariner on the ocean or to the engineer of great works of construction. We ought to promote the existence of societies of this character in every civilized land and the free intercourse and intercommunication of such societies, and the existence of such a spirit of comradeship between them, that they can freely give and take the results of their labors, of their experience, and their skill.

This is of immense practical importance in the administration of government and the progress of ordered liberty in the world; for, after all, the declaration of political principles is of no value unless laws are framed adequate to bring principles down to the practical use of every citizen, and the framing of such laws in every land is the work of the jurists of the land. It is because I may be associated with you in doing what little a lawyer can do toward helping to the accomplishment of this great beneficent and necessary work for civilization that I find the greatest pleasure in accepting your election as a member of this Academy and find cause for gratification beyond mere personal vanity or personal feeling.

Permit me to express the warmest good wishes for the continued activity, prosperity, and usefulness of this distinguished body, which has so greatly honored me by this election.

THE REGULATION OF IMMIGRATION AND THE DOCTRINE OF EXPATRIATION.

The subject of immigration is naturally one that has advanced to a position of greater importance in this country than in any other country during modern times. Its growth from the beginning is due to the migration of peoples from the older nations of the world to this continent. During earlier ages migrations were due to different causes, and were for different purposes than those which have impelled the more

recent migration to our portion of the continent. Previous migrations were due principally to the spirit of conquest, and they were en masse, and not individualistic. They were undertaken for the benefit of the state from which the migrants came, as in Roman times, and not for the benefit of the individual. The earlier migrations were for conquest, for colonization, or for commerce. This was true not only of Roman imperialistic expansion, but also of the Spanish conquests on this continent. A clear line of distinction must be drawn between this form of migration and that which is individualistic and properly termed immigration.

The Act of February 20, 1907, which was reviewed in the Journal for April, has made some material changes in our practice in regard to immigration.

The number of immigrants now annually excluded at our ports averages a little over one per cent of the total immigration. During the last fiscal year the number excluded was, in round figures, 13,000, while the total immigration was 1,285,000. These exclusions often involve extreme hardships, if not human tragedies, and many persons, both in and out of Congress, as well as writers upon the subject of immigration, have advocated the stationing of our immigration officers at the principal seaports in foreign countries, where immigrants could be examined and their admission or rejection finally passed upon, thus obviating the hardships that rejection at our ports involves. There are several serious objections to the adoption of such a plan. In the first place, this could not be done without the consent of foreign governments, and it is not reasonable to suppose that such consent would be given without our granting to them the right to station their officers at our seaports to determine which of our citizens would be permitted to leave the United States and emigrate to their respective countries. To grant such a right in the United States to officials of foreign government would be practically vesting such officials with the power to enforce writs of *ne exeat*. Furthermore, this would involve the regulation of the subject of immigration by international agreement. One objection to such a policy is that it could not be effective without countenancing the position of those governments which claim the perpetual allegiance of their citizens or subjects. This would involve for us the abandonment of an international policy to which we have constantly adhered from the beginning of our Government to the present time, namely, the maintenance of the right of expatriation, which was one of the causes of our war with Great Britain in 1812, and which, through many years of

agitation, has been consistently and strenuously upheld by the executive branch of our Government in its diplomacy. That policy was finally and emphatically enacted into express law in 1868 (Act of July 27; section 1999, Rev. Stats.), which provides:

Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in the recognition of this principle, this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation is declared inconsistent with the fundamental principles of the Republic.

There are other reasons why such an arrangement, from an administrative point of view, would be undesirable, if not fraught with great danger, in that it would be vesting in one or more officials stationed in foreign countries, three thousand miles or more distant, the absolute power of determining who shall or who shall not be permitted to come to our shores.

While deprecating the suggestion of an international agreement it must be admitted that inasmuch as each country has full power to deal with immigration as its national policy may from time to time dictate, or as it deems most expedient, the whole subject cannot be effectively regulated without incurring the objections and suffering the disadvantages that an international agreement would entail. It has been claimed, and not without authority, that when the causes affecting emigration are political or result from religious oppression, and when the effects produced thereby are distinctly reflected into other countries, by a stream of migrants due directly thereto, the latter countries are not only justified, but have the right to remonstrate against the consequent effect upon them by reason of such oppression and the burdens imposed upon their institutions. This right, and the principles upon which it rests, were set forth by President Harrison in his third annual message to Congress (1891) as follows:

The banishment, whether by direct decree or by no less certain indirect methods, of so large a number of men and women is not a local question. A decree to leave one country is in the nature of things an order to enter another — some other. This consideration, as well as the suggestion of humanity, furnishes ample ground for the remonstrances which we have presented to Russia.

THE CASE OF JOHNSON V. BROWNE.

205 U. S. 309.

In *Johnson v. Browne*, 205 U. S. 309, decided on the 8th of April last, the Supreme Court of the United States has made an interesting application of the rule which prohibits the trial of an extradited person for an offense other than that for which he was delivered up. The respondent sued out a writ of *habeas corpus* to obtain his discharge from imprisonment for a crime of which he had been convicted in the Circuit Court of the United States for the Southern District of New York. Prior to his conviction he was indicted on two charges: (1) Conspiring with two other persons to defraud the United States in violation of section 5440 of the Revised Statutes, and (2) knowingly attempting, alone, to enter certain articles at less than the legal rate of duty, in violation of section 5444, Revised Statutes. He was tried on the first charge, and having been convicted thereon he fled to Canada. His surrender was demanded by the United States under the extradition treaty of 1889, which is supplementary to the extradition clause of the Webster-Ashburton Treaty of 1842, on the charge of conspiracy on which he had been tried and convicted before his flight. He was arrested, but the Canadian courts discharged him on the ground that the offense was not within the Treaty of 1889; and it clearly was not within the Treaty of 1842. The United States, however, made a new demand for extradition, under the Treaty of 1889, for the offense embraced in the indictment under section 5444, Revised Statutes. On this demand the fugitive was delivered up; but after he was brought back he was committed to prison to serve out the sentence imposed on his previous conviction under section 5440. It was from this detention that he sought to be released by *habeas corpus*. It had been decided by the Supreme Court in the case of *United States v. Rauscher* (119 U. S. 407) that, in spite of the fact that the Webster-Ashburton Treaty of 1842 contained no prohibition of trial for an offense not included in the demand for extradition, a person delivered up thereunder could not be so tried till he had had an opportunity to return to the jurisdiction from which he was taken. The court maintained that such a prohibition, if not expressed, was to be implied from the principles governing the subject. This ruling would seem in spirit to preclude the detention of an extradited person such as was attempted in the case now under consideration. But there are certain clauses in the Treaty of 1889 on which the detention was sought to be justified. Article 2 of the treaty provides that a person surrendered by either of the high

contracting parties to the other shall not "be triable or tried, or be punished," for any political offense; while article 3, which forbids trial for any other than the extradition offense, merely says that the person surrendered shall not "be triable or be tried" for an offense other than that for which he was extradited. On the strength of this difference in terms it was contended that, where only common and not political offenses were involved, a returned fugitive might be punished under a previous conviction not embraced in his extradition, although he could not be tried on a charge not included in the process. To this contention the Supreme Court refused to give its sanction. The court observed that, while the escape of criminals was to be greatly deprecated, yet it was most important that treaties should be construed in the highest good faith, and that it should not be sought by doubtful construction to obtain the extradition of a person for one offense and then punish him for another and different offense. The opinion of the court was delivered by Mr. Justice Peckham.

THE MEETING OF THE INTERNATIONAL LAW ASSOCIATION AT PORTLAND.

The twenty-fourth conference of the International Law Association was held at Portland, Maine, on August 29, 30, and 31.

The mayor of the city, a grandson of Justice Nathan Clifford of the Supreme Court of the United States, and who bears his name, made an address of welcome, as did also Charles F. Libby, of the local bar, the President of the Cumberland Bar Association, Sir William Kennedy, one of the Lords Justices of Appeal, president of the conference, making the response.

The International Law Association follows the European practice for such bodies in having officers of its conferences distinct from the regular officers of the association, and also in supplementing the office of president by that of honorary president. Chief Justice Simeon E. Baldwin, of Connecticut, had been appointed by the council to the latter position, and the regular proceedings were opened by his inaugural address. After alluding to the fact that the former meeting of the association in this country had taken place in the year of the first Hague conference of peace, and that the present one was being held while the second of those conferences was in session, he observed that while the institution of The Hague Tribunal had proved that a court of nations could be and was a reality, it was not to be forgotten that another movement of hardly less international importance had also proceeded from the four conferences

at The Hague in 1893, 1894, 1900, and 1904 for the advancement of private international law. England and the United States had not been represented there. It had been thought that their trend of legal thought was so out of harmony with that of Continental Europe that it would be useless for them to participate in these gatherings. But was this necessarily so? The great points of divergence were as to what should be the criterion of personal *status*, and what the rule of succession to landed property. But, attached as they were to the criterion of domicile, England and the United States could not shut their eyes to the fact that ten or more European powers had now agreed that nationality was a better one. These two nations had originally adopted domicile as the test because Europe had. Europe had changed her conviction, and it was far from impossible that they might yet change theirs. Of the old arguments against the substitution of nationality, several had lost much of their force through the changed conditions of our modern society. So in regard to landed property, England and the United States were, in their attitude, largely affected by the lingering principles of feudalism. Was it worth while to cling forever to the incidents of an outworn theory of government? Had not the whole economic tendencies of our times gone towards a mobilization of the soil?

Dr. W. Evans Darby, of London, the secretary of the English Peace Society, then read a review of the main international incidents since the preceding conference, which was held in Berlin last fall. There had been no activity on the part of The Hague Court, no striking cases of arbitration before any other international tribunal, and no new arbitration treaties of importance. But this really was a sign of progress. It showed that there were no serious international disputes pressing for adjustment. Five left over from former years had been settled by peaceful means since his last report at Berlin, *i. e.*, those between Beluchistan and Persia, Great Britain and Portugal, Japan and Russia (as to their respective limits on the island of Saghalin), Egypt and Turkey, and Bulgaria and Turkey. All these had come to a peaceful determination through the action of special commissions. Nineteen similar proceedings were pending unfinished. France and Great Britain had, on October 20, 1906, agreed on a convention regulating the government of the New Hebrides. One of its features is the establishment of a joint international court of three judges. Each power appoints one, and the third is to be a citizen of neither. Thirty-nine treaties of obligatory arbitration have been thus far signed, exclusive of the eleven negotiated by the United States but not ratified. The costs of the bureau of The

Hague Tribunal thus far had been, in florins: 1900, 42,499; 1901, 30,438; 1902, 28,764; 1903, 25,917; 1904, 24,574; 1905, 28,201; 1906, 26,012.

The annual average, therefore, was something like \$12,000 a year — a small sum for the civilized world to spend, considering the results already accomplished. The bureau costs of the four cases thus far heard had in all amounted to about \$1,200. This, of course, does not include the compensation of the judges who sat to decide them.

Among the papers subsequently submitted, the following may be specially mentioned: Dean Gregory, of the Iowa University Law School, commented on the exercise of the power of eminent domain as affecting lands held or desired for international uses. Without discussing the question whether the concessions for the Suez and Panama canals had or had not been obtained by force or extortion, he was inclined to think that the world could not be expected to submit to the defeat of a beneficent project of universal importance by the refusal of local sovereignties to grant the use of means that were absolutely essential. Dr. A. C. Schröder, of Zurich, urged the negotiation of treaties which would look towards a reduction of armaments by withdrawing the causes for taking up arms. He suggested as the bases of such a treaty between Great Britain and Germany, mutual pledges that each would strive to further liberal ideas of social equality and progress, to assist the other in suppressing "trusts" and corners, to promote intelligent emigration, without preferences, to cooperate in the transportation of goods by rail, not to make any sudden raise of tariffs, and to suffer no attempts by citizens of either on the security or sovereignty of the other. Dr. A. Hindenburg, of Copenhagen, legal adviser to the Crown of Denmark, deprecated the obstacles now existing in the way of getting testimony of foreign witnesses in court. In most of Europe their depositions will not be required by their own government without a preliminary inquiry before its own courts, and an order based upon it. Denmark and Norway follow what is in substance the American plan. They regard an application to take a deposition as presumptive proof that justice requires it to be taken. While their courts reserve the power to reject testimony that is plainly irrelevant to the case of the moving party, on such an application, in practice they exert it very seldom. The witness whose testimony is desired must, however, be cited before a court, and the judges conduct the examination. Dr. Ernö Wittman, of Budapest, deplored the tendencies of nations to tax everything within their power, without asking whether it has not already been taxed elsewhere, as heavily as it will bear.

This shows itself particularly in regard to successions. Belgium taxes successions to foreign lands on the death of the owner, if he be domiciled in that country. England taxes the succession of a domiciled foreigner, as respects his entire personal property, wherever situated, and his own country probably lays a tax of equal extent, although most of the property may be in England. France imposes her death duties on the theory either of the *lex rei sitæ*, the *lex domicilii*, or the *lex successionis*, according as it fits best the case in hand, regarding the interest of the fisc. A Hungarian domiciled in London dies there. He owns lands in Hungary, stocks in London, and stocks in Paris. Hungary taxes the entire succession; England the entire movable succession; France the French stocks. The latter therefore pay three death duties. All this impedes the natural course of international trade and causes international ill feeling. The true solution is to follow the rule of the *lex rei sitæ*. As regards intangible property, bank bills, public securities, loans on interest, negotiable bonds, and shares in moneyed corporations, they should have a legal *situs* for this purpose, wherever the papers constituting or evincing them are. Ships should be taxable in the country of the home port. Debts payable at a designated place should be taxable there only. Chief Justice Baldwin discussed the subject of collecting private claims against a foreign government. He favored substantially the American proposals on this subject presented to The Hague Conference of 1907. M. Gaston de Leva, of the Brussels bar, followed him, and spoke with vigor and spirit in favor of using force when force was necessary and only then.

Hon. Everett P. Wheeler, LL. D., of New York, spoke of the special difficulty in negotiating treaties for the United States (1) on account of the participation in them of one branch of the legislature only, while if they called for positive acts or payments the consent or even the initiative of the other branch was necessary, and (2) on account of the relations of the United States to the several States. His treatment of the latter point gave rise to an extended debate, in which some of the American members contended for the right of a State to refuse obedience to a treaty stipulation which was inconsistent with the principles of her political system.

The generally accepted extensions, under modern conditions, of the definitions of contraband were effectively discussed by Lord Justice Kennedy and Justice Charles B. Elliott of the Supreme Court of Minnesota.

The committee on international corporation law having reported, through its convener, Wm. F. Hamilton, K. C., of London, that the projected code as to the international recognition of business companies,

referred back to them at the Berlin conference of 1906 for further consideration, needed no substantial alteration, the project was adopted, on the recommendation of the council.

Among the foreign members present who took no active part in discussion were Sir Frederick Pollock, Dr. Victor Schneider, of Berlin, the secretary of the conference of 1906, and Sir Kenelm Digby, the author of the well-known treatise on the history of law of real property. Ambassador Bryce attended one or two of the sittings, and briefly responded, with his usual felicity of expression, in a few off-hand remarks, to a call from the chair.

The conference was of particular interest to those familiar only with American methods of conducting the business of such bodies by its practical exposition of the efficiency of a directing body, within the association, which was its real voice. Any new proposition for new action made from the floor went, under a standing rule, to the council, without debate. The council named the officers, shaped the business, elected new members, was never in sight, but always in evidence by its results.

The next meeting of the association is to be at Budapest about the middle of September, 1908. Thirty or forty Americans were elected to membership during the sessions at Portland.

RECENT DISTURBANCES IN MOROCCO.

Since the appearance in the January Journal of the editorial comment upon the Algeciras Conference, a new chapter of Moroccan history has been written. It will be remembered that the representatives of the twelve powers who in the early months of 1906 met together at Algeciras to consider the Moroccan situation announced that "Inspired by the interest attaching itself to the reign of order, peace, and prosperity in Morocco, and recognizing that the attainment thereof can only be effected by means of the introduction of reforms based upon the triple principle of the sovereignty and independence of His Majesty the Sultan, the integrity of his domains, and economic liberty without any inequality," they had met "for the purpose of arriving at an understanding upon the said reforms." The "understanding" was indeed reached, and everything seemed auspicious for the future of Morocco, but the recent disturbances indicate, to say the least, that the "reign of order, peace, and prosperity" remains to be realized.

The situation in Morocco was peculiarly ill-adapted either for concerted action of the powers or for the thoroughgoing interference of any

single power. Before the Algeciras Convention France had told the world that she could not tolerate the supremacy of any other power in Morocco. Her position in Northern Africa was well understood, and the preeminence of her claims to superior influence in Morocco found objective expression in the provisions of the General Act. The Spanish claims were also recognized to a lesser extent. In the recent situation both of these countries realized that ranking privileges involved ranking obligations. But the chaos of affairs in Morocco was so general, and the danger of a holy war of the guerrilla type was so imminent, that Spain was decidedly reluctant, while France hesitated to enter upon a long war of subjugation and occupation, with its consequent depletion of the national fisc and weakening of the national military power. Nothing beyond necessary intervention was, therefore, attempted, and the integrity of Morocco was scrupulously respected.

The situation in Morocco had been threatening for months before the actual outbreak came. In March the French doctor, Mauchamp, was treacherously murdered, and French troops proceeded to occupy the town of Oudjda, pending satisfaction for this and other claims, while two cruisers were sent to support the demands that were made. No serious complications resulted at the time. In the last days of July, however, an attack was made upon workmen operating the railroad running between the quarry and the new pier at Casa Blanca which is being constructed by a French company. A number of French, Italian, and Spanish laborers were killed, but Mouley Amin, uncle of the Sultan, assumed control, and quiet was restored and maintained until the arrival of the French cruiser *Galillée*. Against the protests of the British and other consuls an insufficient force of sixty men was landed before the arrival of reinforcements to protect the French consulate, and a general riot ensued. The rabble of the town uprose and the tribes from the hills poured down. The *Galillée* opened fire on the town, and when the French and Spanish fleets arrived later the bombardment was continued by the French cruisers. Untold horrors were suffered, and a large part of the town was wiped out of existence.

Meantime, the peace of the country was still further jeopardized by the uprising in the south of Mouley Hafid, the Sultan's brother, with pretensions to the sultanate. It seemed at one time that he might be successful in overthrowing the *de jure* government, but it has developed subsequently that there is little money in his treasury and that many of those who espoused his cause were overawed. Moreover, although Mouley Hafid is reported to be a man of liberal and progressive views, the chief tenet of his party seems to be opposition to the French.

In the midst of these new agitations Raisuli continues to menace the safety of a large portion of Morocco. Having inflicted one severe defeat upon the army of the Sultan, he remains intrenched in the mountains, holding Kaid MacLean in uncomfortable captivity. His first demands were preposterous, since they included not only amnesty and an enormous ransom, but his appointment to the governorship of a large district in northern Morocco. It is understood that these demands have more recently been materially modified and that a settlement has been agreed upon, although Kaid MacLean has not yet been released.

Under these conditions the Tangier correspondent of the London Times writes:

The Morocco stage is already overcrowded with actors, but so bewildering has become the play that the present phase can only be described as a melodramatic nightmare performed by comedians. To attempt to grasp the whole plot is beyond the powers even of students of Moroccan affairs.

For the present, however, the situation appears to be under control.

But what of the General Act of Algeciras? The animosity revealed in the recent outbreaks seems to be directed almost entirely against the improvements proposed by that act and undertaken under the patronage of foreign governments. Especially is that animosity directed against the French on account of the introduction of the wireless telegraph, the control of the customs, and harbor improvements which have necessitated the building of some railways. The efficiency in time of crisis of the "international" bank provided for at Algeciras was demonstrated when once it was determined to support the present Sultan against the pretensions of his brother. It was necessary for the Sultan to go to the coast with some display of authority in order to show himself to the agitated tribes and regain their confidence. The bank made the loan of 1,000,000 francs needed for the journey of His Shereefian Majesty from Fez to Rabat.

Chapter I of the General Act provided for the organization of a military police for the seaport towns of Morocco, recruited from the Moorish Mohammedans and under the instruction of French and Spanish officers. It is probable that had this police organization been in operation the recent disturbances would not have occurred, or at least would not have become so serious, unless the native police had deserted to the insurrectionists. Since the troubles have arisen the Moorish Government has given the French and Spanish authorities to understand that it cannot in the present situation give assurance of the faith and discipline of native police organized in accordance with the terms of the General Act. At the opening of hostilities France and Spain, realizing their superior

responsibility, agreed, with the consent of the powers, to undertake the protection of foreigners and foreign interests in Morocco. They have found it necessary, therefore, to establish a temporary police of their own forces.

The United States has been a silent observer of late affairs in Morocco. There are no great American interests and no large number of American citizens to be protected. Our position as a signatory of the General Act was clearly defined not only by the reservation of the declaration made by the American representatives in the plenary session of the Algeiras Conference, but by the subsequent resolution of the Senate:

* * * as a part of this act of ratification, that the Senate understands that the participation of the United States in the Algeiras Conference, and the formulation and adoption of the General Act and Protocol which resulted therefrom, was with the sole purpose of preserving and increasing its commerce in Morocco, the protection as to life, liberty and property of its citizens residing or traveling therein, and of aiding by its friendly offices and efforts in removing friction and controversy which seemed to menace the peace between the powers signatory with the United States to the treaty of 1880, all of which are on terms of amity with this Government; and without purpose to depart from the traditional American foreign policy which forbids participation by the United States in the settlement of political questions which are entirely European in their scope.

THE SAN DOMINICAN "ENABLING ACT."

The National Congress of the Dominican Republic having been convened by President Caceres in extraordinary session on September 15, 1907, enacted a law on September 16, 1907, authorizing the Executive Power, through the Secretary of Finance and Commerce, to issue and sell \$20,000,000 bonds of the Republic and to enter into related financial engagements, for the purpose of complying with the provisions of the convention between the Republic and the United States celebrated under date of February 6, 1907. This enabling act supersedes the conditional financial engagements entered into in September, 1906, by the representative of the Dominican Republic, and since lapsed. The present measure vests full authority in the Dominican Executive, subject only to the terms of the recent convention, and any financial arrangements growing out of it require no further submission to the Dominican Congress. It should now be possible for the Republic to carry to a successful end the programme of financial readjustment contemplated by the convention. The official text of the enabling act was published in the *Gaceta Oficial* of Santo Domingo City, of September 18, 1907; it is reproduced in the Supplement, p. 408.

THE RECENT ANGLO-RUSSIAN CONVENTION.

The Anglo-Russian Convention (in three parts) signed August 31, 1907, at St. Petersburg (see Supplement, p. 398), may, to quote the *Spectator* (September 28), in an editorial at once hopeful, congratulatory, and condescending, "be described in the technical language of photography as a 'fixing' solution," that is, its terms are supposed merely to recognize and define as to interests and influence the status existing in Persia at the moment of signing.

The following briefly summarizes its provisions:

By the first "Arrangement" of the Convention, Persia, like Gaul, is divided into three parts. The first includes all that portion of Persian territory lying south and east of a line drawn from the Afghan boundary near Gazik, through Gazik, Birjand, and Kerman to Bunder Abbas on the Strait of Ormuz — this is the British sphere; the second, or northern zone, all that portion lying within and north of an angle that has its vertex in the south at the town of Yezd, and that runs thence northeast and northwest — northeast through Kakhk to the intersection of the Persian, Russian, and Afghan frontiers, and northwest through Isfahan to Kasr-i-Shirin — this is the Russian sphere; third, the territory lying between these two sections, which by the terms of the instrument is left to Persia.

The contracting parties next assign to themselves their respective powers in all this territory and mutually bind themselves in identical language (1) not to seek for themselves and not to support in favor of the subjects of third powers "any concessions of a political or commercial nature — such as concessions for railways, banks, telegraphs, roads, transport, insurance, etc.," outside their respective zones; and (2) not to oppose any concessions to the subjects of the other in the central zone without previous arrangements with the other.

Finally the instrument provides for the disposition of the revenue from the Persian customs and the amortization of certain Persian loans held by Russian and English banks.

The second part of the Convention (under the title "Convention") relates to Afghanistan.

It provides that Great Britain shall not change the political situation in that country nor interfere with its internal government — provided the terms of the treaty with the late Ameer Abdur Rahman are fulfilled; nor will she herself take "nor encourage Afghanistan to take any measures threatening Russia." Russia, on her part, recognizes that Afghanistan is outside her sphere of influence and undertakes to dispense with her agents there and to deal with the Afghanistan govern-

ment through England as an intermediary. These "Arrangements will only come into force" when England notifies Russia that the Ameer has consented to the stipulated terms.

A third part of the Convention, styled an "Arrangement," relates to Thibet. It respects the territorial integrity of that country, recognizes China's suzerain rights, and provides that the parties shall treat with Thibet through the Chinese Government only, except as to the direct relations guaranteed to the British Government by Article V of the Anglo-Chinese Convention of September 7, 1904 (Supplement, January, p. 80), and Article I of the Convention of April 27, 1906. Neither Government is to send representatives to Lhassa, nor to seek concessions for themselves or their subjects, nor to secure the pledging of the Thibetan revenue to themselves or their subjects. An "Annex" to this agreement provides for the withdrawal of British troops from the Chumbi valley so soon as the stipulations (concerning indemnity and trade marts) of the 1904 Convention have been fulfilled; and by letters exchanged on August 18, 1907, the two powers agree that no "scientific mission" shall, for a period of three years, be allowed entry into Thibet except by a previous agreement between the two Governments.

From this summary of its terms it is evident that the Convention particularly affects Persia, less directly China, Russia and England, and perhaps, remotely, other nations, by reason of some disturbance of the European balance of power.

Its meaning for Persia is, of course, deep and far reaching, both as to its foreign and internal relations. Even admitting, as is contended by the English press, that the Convention does no more than recognize the actual existing conditions in Persia, yet it does do that, and obviously any formal announcement or recognition of the fact that a hitherto sovereign nation is no longer completely sovereign is a matter of the greatest import, not only because of its effect upon the national life of the individual nation, but because of its direct bearing upon the intercourse between that nation and all others.

It seems evident that Persia's policy concerning her foreign commerce will be most immediately affected, for while both Russia and Great Britain have bound themselves not to support for themselves or their subjects, or for the subjects of other powers, any concession "beyond" their own zones, and each is not to oppose concessions to the other in the independent zone "without a previous arrangement" between them, yet this leaves each perfectly free to oppose such concessions in the central zone as may be sought by the citizens or subjects of third powers,

and likewise to oppose concessions to others than themselves in their own zones. That is, the treaty, even if it does not contemplate, might easily be interpreted to protect the monopolizing of Persian resources by Russia and Great Britain. Indeed, the treaty expressly provides that the respective Governments may either "support" or "oppose" alien petitioners for Persian concessions. There is nothing of the "Open Door" in this "Agreement."

Hereafter alien Persian concessionaries must deal not only with the Persian Government but with the British and the Russian foreign offices. Whether Persia is also to lose control of her foreign affairs under the new status remains to be seen.

However, the instrument contains, as to Persia's domestic affairs, other and more significant provisions that seem clearly to have a vital relation to the internal government. True, in the opening paragraph of the "Arrangement" the arranging powers mutually and formally engage themselves "to respect the integrity and independence of Persia," but this phrase is no stronger, as pointed out by a Persian correspondent in the *Spectator* (Oct. 26), than the language used by certain powers in their treaties with Tunis, Morocco, and Egypt. Moreover, the phrase is immediately followed, and it would seem purposely limited, by the declaration that both powers have entered into the agreement because they sincerely desire the "preservation of order throughout that country and its peaceful development, as well as the permanent establishment of equal advantages for the trade and industry of all other nations," and because "each of them has for geographical and economic reasons, a special interest in the maintenance of peace and order in certain provinces of Persia adjoining, or in the neighborhood of, the Russian frontier on the one hand and the frontiers of Afghanistan and Beluchistan on the other hand." These words of inducement, if read, as they must be, by the light of attendant conditions, are of unusual significance, since at the very moment of signature Persia was (and still is) in the grasp of an apparently widespread revolutionary movement which had already manifested itself in numerous burnings, pillagings, and plunderings, and which was particularly vigorous within the zone allotted to Russia. The present violence dates from disturbances that resulted from an ineffectual attempt by a Persian armed force, under command of the vigorous Majd-es-Sultaneh, to capture, in the disputed Turko-Persian frontier in the indefinite Kurdistan region, the accomplices in the murder of the Rev. B. W. Labaree, an American missionary killed at Urumiah in March, 1904. In pursuing these fugitive

criminals the Persian forces, after penetrating the disputed territory for some distance, were suddenly confronted by a greatly superior body of Turkish troops whose commander gave Majd-es-Sultaneh the option of battle or withdrawal. Majd-es-Sultaneh chose the latter, but before he could get away the Turks attacked him and his forces retired towards Persia, the Turks following them, it is alleged, into undisputed Persian territory, where they pillaged and plundered a number of Nestorian Christian villages. (The Turkish advance was stopped by the Porte as the result of the combined representations of America, Great Britain, and Russia.) This formed the prelude to general scenes of violence and bloodshed, later enacted by a number of revolutionary parties in north-western Persia; and these in turn were followed by others — particularly in Tabriz and the province of Azerbaijan in the north, and the province of Lusistan in the west. These disturbances have at times risen to the dignity of field movements by armed revolutionary forces, marching towards, though never reaching, the capital, one body of them, at least, being under the command of a brother of the Shah. Hitherto the Government seems to have been wholly unable to meet the situation successfully. A Grand Vizier, appointed because of his reputed power and ability to quell the disturbances, was assassinated. The people appear to have been not only not mollified, but inflamed, by the half-hearted fulfillment of the promises made by the late Shah in 1905, concerning the establishment of a representative government. Even the election and convening of the National Council has failed to satisfy the people, who continue the disturbances. With Persia's internal affairs in this condition, Russia, it is said, has recently sent a note to the National Council calling attention to the troubles and intimating that she might find it necessary to interfere unless order were soon restored. The President of the Council is reported to have returned the note requesting a modification of its tone and suggesting that similar disturbances had accompanied similar constitutional reforms on the other side of the Persian boundary. There seems little doubt but that Russia will not only be willing, but is actually under obligation, to carry out her intimated policy unless the Shah is able to bring a speedy order out of the present chaos. And if Persia once loses control of her local government, it is a question when it will be restored to her.

Well may the Spectator suggest that the two powers have on their hands another "sick man," and it is most significant that certain quarters seem to regard it as his last illness. "Of course, it is sad that Persia should decline — the decline of every country, the death of every

man, is sad — but the existence or nonexistence of the convention makes not a jot of difference to her condition. * * * Her illness was obvious. All that has happened now is that the doctors have told her the truth." (*Spectator*, Sept. 28, 1907.) However, Russian and English control will doubtless mean an ending of the Persian missionary troubles.

As to the effects upon Russia and England, the contracting parties doubtless expect them to be both beneficial and permanent. Russia gives up, for the present at least, all hope of an ice-free port on the Indian Ocean, a goal she is supposed to have been seeking from her earliest history; but she now circles the Caspian and has all but acquired what are said to be the richest regions of Persia. She also has doubtless weakened Japan's position, since the supposed moving cause for the Anglo-Japanese treaty, the fear by England of Russian aggression southward toward the Indian Ocean, has now by this treaty been largely removed; but she has acquired an unsettled boundary dispute of long standing with Turkey, the disputed region being inhabited by a semi-barbarous people who appear ready to cause trouble at any time on the slightest provocation. She also gives up, while the treaty lasts, all hope of further territorial expansion southward; but she has freed herself from the apprehension of a further English advance, particularly in the direction of Thibet, and so may reduce her forces and expenditures all along her southern frontier. Everything considered, Muscovite diplomacy need have no shame because of the recently negotiated treaty.

As for England, the *Spectator* says,

The spectre of the Russian danger on our Indian frontier is laid. * * * Now that Russia has promised to send no more agents to Afghanistan in order to sow wild ideas in the brain of the Ameer, and has also promised to keep her hands off that triangle of Persian territory through which she might have turned the flank of our position in India, our expensive suspicions are ended. It is thoroughly satisfactory to think that the crisis of this long disease of anxiety about Russian intentions is over. For more than half a century Russia refused to give us the assurances we asked for — and suspicion broke out afresh with every refusal — but at last she has given them.

Truly, the great consideration running to the British in this transaction is the laying of the spectre of Russian advance by the Southern Asiatic frontier. Britain has in Persia given up Isfahan and Kashan, where English interests were paramount, as well as some of the richest and most civilized northern provinces, but Russia has indicated her willingness to abandon her designs for a seaport on the Persian Gulf, and so Britain's left Indian flank is safe. The price paid here is certainly not too great.

England also seems to have sacrificed practically all that was gained by Colonel Younghusband's recent invasion of Thibet, but she secures Russia's promise to recognize and respect Thibetan integrity and Chinese suzerainty (this much China gains), and so avoids the necessity of a large standing guard there. Further, she has not only secured the recognition of the existing status in Afghanistan, but has obtained a promise that Russia will remove her agents from Afghan territory and will treat with that Government through England as an intermediary. She would seem moreover to have strengthened her position with Japan because, as indicated above, the Anglo-Japanese alliance would appear to be no longer of prime importance to England and to have become of chief importance to Japan, because Russia, by securing her southern frontier, is left a freer hand to deal with the far east, and in proportion as Russia grows stronger there, Japan has need of the English alliance. This vantage may serve Britain a good turn in meeting with Japan the problems which the Pacific coast situation seems to be forcing before the two Governments.

The only real losses to England are in Persia and Thibet, and it would seem she could well afford to barter these for frontier security. Sir Edward Gray may well be congratulated on his achievements.

As to its effect upon the European powers, France is reported as rejoicing over this agreement between two countries with which she has an alliance, while Germany is considered as again excluded from the concert of powers and as having her commercial advance into Persia checked if not, indeed, entirely cut off. But it is not thought this in itself will precipitate any serious trouble. The situation seems admirably covered by the Spectator when it says:

If it has any effect upon the equilibrium of Europe, it will be an effect wholly unpremeditated. Such results, of course, are conceivable; it is always conceivable that a European Power which restricts its anxieties far away from home will expend nearer home the reserve of political nerve-power thus set free. But, on the whole, we do not think that the Convention will have any directly recognizable influence upon what we call the balance of power in Europe.

THE DISPUTE BETWEEN THE ARGENTINE REPUBLIC AND URUGUAY AS TO THEIR JURISDICTION IN THE RIO DE LA PLATA.

✓ The long-standing dispute between the Argentine Republic and Uruguay as to their jurisdiction in the Rio de la Plata has recently been revived owing to a decree of the Uruguayan Government of August 3rd

providing for the issuance of permits to employ drag-nets in fishing "outside a zone of five miles from the coast and up to the middle of the river." This decree is considered peculiarly objectionable by the Argentine Government since Article 8 provides that "the fish obtained by means of drag-nets will be sold during the first six months from the date of this decree in the exterior." Inasmuch as the fresh fish from the Rio de la Plata can be kept but a short time, the most available "exterior" market would seem to be Buenos Aires, and it is claimed by Argentina that not only is the concession as a whole illegal in that it invades the territorial waters of Argentina, but that this provision means a ruinous competition for the Argentine fishermen, whose fishing rights under Argentine law are by on means so liberal in character.

More recently (November 6th), the press dispatches report friction as the result of the detention by the Argentine authorities of a small Uruguayan steam vessel at the Island of Martin García, a small island in the Plata the title to which is in dispute between the two Governments.

As long ago as 1853, the strategic importance of this island was understood, and in the treaty of that year between the United States and the Argentine Republic it was provided, article 5, that —

The High Contracting Parties, considering that the Island of Martin García may, from its position, embarrass and impede the free navigation of the Confluents of the River Plate, agree to use their influence to prevent the possession of the said Island from being retained or held by any State of the River Plate, or its Confluents which shall not have given its adhesion to the principle of their free navigation.

Happily, no question of the free navigation and commerce of the river enters into the present dispute, as these are assured and decreed by constitutional and treaty provisions. The dispute relates to general territorial jurisdiction, with its accompanying sovereign and proprietary rights.

Argentina appears to claim jurisdiction over the entire estuary of the Rio de la Plata except an indefinite marginal zone on the Uruguayan coast, basing her claim on historical grounds, while Uruguay seems to contend that the territorial jurisdiction of the two countries should be divided by a line drawn either through the middle of the channel of the river *filum aquæ* or the *thalweg* or by an imaginary line drawn exactly through the geographical center of the water surface.

The physical configuration of the Rio de la Plata is such as at once to increase the importance and the difficulty of the jurisdictional questions involved. The Rio de la Plata is formed by the conjunction, at an

obtuse angle, of the Uruguay and Parana rivers. As a result, the Plata has no deep central channel, but has two channels, one towards Buenos Aires, which is practically a prolongation of the Parana River, and the other along the coast of Uruguay, the latter being virtually a prolongation of the Uruguay River reinforced by the Parana, which, through a large arm, sends a great part of its waters toward the Uruguayan shore; and it is claimed by the Argentine Government that the Island of Martin García, though apparently in the Uruguay River, is in fact, owing to the configuration of the channel, separated from Uruguay by the main channel of the Uruguay River. Moreover, the deep channel of the Plata on the Argentine shore appears not to extend to the open sea. At the river mouth there are various banks, such as those known as the Peidas, Arquimedas, and Ingles, which block the entrance on the Argentine shore and produce deep waters on the Uruguayan side.

✓ So much for the difficulty of determining the *filum aquæ* or *thalweg* if it were conceded that the dispute were to be determined by the application of the ordinary principle of international law. The great practical importance of the physical facts under the contentions actually advanced by the two Governments will be noted later on.

✓ As a matter of fact, however, neither country appears to admit that the so-called "thread of the stream" furnishes in this case the proper boundary line. The Argentine Government, as above noted, seems to have always maintained that its jurisdiction extends over the entire Rio de la Plata, except a restricted zone along the Uruguayan shore, the extent of which has never been expressly defined, but which is assumed to be the ordinary three-mile limit of territorial waters. The Argentine contention rests principally upon the historical argument that Uruguay, which was originally known as the "Oriental Province" and formed a part of the old united Provinces of Rio de la Plata and was in fact united with them until 1817 (when it was seized by the Portuguese, and later in 1822 by the Brazilians when they won their independence from Portugal), does not and cannot have other legal limits in the river than those which it possessed as an Argentine province, and, according to the Argentine contention, these boundaries of the "Oriental Province" were, in accordance with principles laid down in older treaties, fixed in 1814 as the east bank of the Uruguay River and the north bank of the Rio de la Plata.

✓ The situation, therefore, according to the contention of Argentina, appears to resemble, in a general way (aside from the fact that Uruguay

is admitted to have jurisdiction over an undefined marginal zone), that along the Ohio River where Virginia ceded to Congress all her territory "situate, lying, and being to the northwest of the Ohio River," by which grant Virginia has always been held to retain jurisdiction over the river itself. See *Handly's Lessee v. Anthony, et al.*, 5 Wheaton 374,

✓On the other hand, Uruguay maintains that the colonial and provincial antecedents are entirely immaterial, since the two banks of the Rio de la Plata no longer belong to the same country. It maintains that the independence of Uruguay carried with it the ordinary jurisdictional consequences of national independence and that the general principles governing the demarkation of the jurisdictional boundary upon international rivers should be applied.

✓The Uruguayan claim appears to be in the alternative—that the boundary line should follow either the middle of the main navigable channel, the *filum aquæ* or *thalweg*, or an imaginary line drawn exactly through the geographical center of the river. This latter contention would seem to find support in the ruling of the Supreme Court of Iowa in the case of *Dunleith & Dubuque Bridge Company v. The County of Dubuque*, 55 Iowa 558, which, when defining the boundary between Iowa and Illinois in the Mississippi River, a river in which the navigable channel is tortuous, shifting, and uncertain, held that the expression "middle of the river" should be construed to mean a line midway of the water surface. The Supreme Court of Illinois, however, repudiated the decision in the Iowa case and adhered to what appears to be the orthodox American rule that "when applied to rivers as boundaries between States, the phrases 'middle of the river' and 'middle of the main channel' are equivalent expressions and both mean the center line of the main channel or, as it is most frequently expressed, the 'thread of the stream.'" *Buttenuth v. The St. Louis Bridge Company*, 123 Illinois 535.

✓Frequently the two rules would yield substantially the same result. In the case of the Rio de la Plata, however, as above pointed out, the geographical center of the river, instead of being the middle of the main channel, is frequently the shallowest portion of the river, and if the Uruguayan contention for a division midway of the water surface were accepted, a hostile fleet might easily sail up the river safely within Uruguayan waters and seriously threaten Buenos Aires as well as the Uruguay and Parana rivers from the rear; whereas, under the Argentine contention, or even, it would seem, under the rule which fixes the boundary in the thread of the main channel, it would be possible for

Argentine to forestall any such attempt through the adoption of suitable precautions.

Moreover, it should be remembered that the estuary of the Rio de la Plata is 190 miles in length from northwest to southeast, and where it joins the Atlantic Ocean between Maldonado and Cape San Antonio is 135 miles across, while even at the head of the inner estuary it is about 75 miles in width. Under these circumstances, it might be contended that the ordinary rule defining the limits of marginal waters should be applied and that everything outside the three-mile line on both coasts should be considered as a part of the high seas free to the warships of all nations. The settlement of the question along these lines, it will be noted, would leave Buenos Aires even more open to hostile attack than if jurisdiction were conceded to Uruguay. Doubtless, however, both Argentina and Uruguay would unite in claiming that the estuary of the Plata is not a part of the high seas, and such a contention would seem to find much support in the attitude of other countries and in the decided cases. See the case of *The Grange*, 1 American State Papers, 147-149, 1 Opinions of the Attorneys-General 32, in which the Attorney-General ruled that the whole of Delaware Bay is within the territorial jurisdiction of the United States; *The Alleghanian*, 4 Moore's International Arbitrations 4333, 5 *ibid* 4675, Scott's Cases on International Law 143, in which the waters of Chesapeake Bay were held to be within the jurisdiction of the United States; *Direct U. S. Cable Company v. Anglo-American Telegraph Company*, House of Lords 2 Appeal Cases 394, the Conception Bay case; and *Manchester v. Massachusetts*, 1890, 139 U. S. 240, in which Buzzards' Bay was held to be within the jurisdiction of Massachusetts.

It is in view of the serious consequences which might follow a decision either upholding the Uruguayan contention or deciding that the estuary of the Plata outside the usual three-mile line is a part of the high seas, that the Argentine Government is understood to feel that, notwithstanding the very ample terms of the general arbitration treaty between Argentina and Uruguay negotiated in 1899 and ratified in 1902, the question as to the limits of the two countries in the Rio de la Plata affects so nearly the integrity and safety of the Republic that it cannot properly be submitted to arbitration.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. Sc. Pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives diplomatiques, Paris; *B.*, boletín, bulletin, bollettino; *B. A. R.*, Monthly bulletin of the International Bureau of American Republics, Washington; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil général de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs-G.*, Reichs-Gesetzblatt, Berlin; *Staatsb.*, *Staatsblad*, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stats. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

September, 1906.

- 19 INTERNATIONAL. Convention signed at Berne by France, Germany, Austria, Hungary, Belgium, Denmark, Italy, Luxemburg, Netherlands, Roumania, Russia and Switzerland, additional to the international convention signed October 14, 1890 (*State Papers*, 82: 771, 796; *N. R. G.* 19:289), respecting transportation of goods by rail. *J. O.*, July 26, 1907.

December, 1906.

- 19 HOLY SEE. Protest addressed to papal nuncios against seizure December 11, 1906, by France of papers of Mgr. Montagnini at Paris. *R. gen. dr. int. public*, 1907, Documents, 22; *Lémonon: Les rapports de la France et du Saint-Siège. R. dr. int. et leg. comp.* 9:415; Fullerton: *Church and State in France*, *National R.*, May, 1907.

January, 1907.

- 30 PORTUGAL—SPAIN. Act of the international commission on marking the Guadiana River with buoys and lights. Approved by exchange of notes June 5, 1907. *Ga. de Madrid*, June 25.

February, 1907.

- 14 GERMANY—SWITZERLAND. Treaty signed at Berlin; ratifications exchanged at Berlin July 16, 1907; proclaimed in Germany July 19, 1907. Attestation of public records. *Reichs-G.* 1907, Nos. 33 and 34.
- 18 GREAT BRITAIN—NORWAY. Extradition agreement signed at Christiania. Provides that the treaty between Great Britain and Norway and Sweden, signed June 26, 1873 (*N. R. G.* 1:570), shall remain in force in so far as its provisions apply to Norway alone, and declares certain additions to the offences set out in Article II of said treaty. *Treaty ser.*, 1907, No. 19. An order in council of Great Britain under the extradition acts, 1870 to 1906, applied in the case of Norway, those acts in accordance with the said treaty and additional agreement. *London Ga.*, July 9.

March, 1907.

- 3 DENMARK—ITALY. Declaration signed at Rome respecting protection of industrial models and designs. Italian royal decree promulgating, August 5, 1907. *Ga. Ufficiale*, September 10.
- 5 BELGIUM—GREAT BRITAIN. Convention signed at London supplementing article XIV of the treaty of extradition signed at Brussels, October 29, 1901 (*State Papers*, 94:7). In the relations of each party with the extra-European colonies and foreign possessions of the other, the periods fixed after arrest for request for extradition and production of evidence are extended to two months and three months respectively. *Treaty ser.*, 1907, No. 16; *Monit.*, July 8 and 9. Ratifications exchanged at London, April 17, 1907. British order in council putting in force, July 6. *London Ga.*, July 9. See *February 11, 1907*.
- 13 UNITED STATES. Ratification by President of convention signed at Rio de Janeiro, August 13, 1906, continuing in force until December 31, 1912, the convention for arbitration of pecuniary claims signed at Mexico January 30, 1902 (*Documents* 1:303), excepting the third article, which is abolished. Ratification advised by U. S. Senate March 2, 1907. For text, see *B. Min. Rel. Ext. (Quito)* 1:212; and *Report of delegates of U. S. to Third Int. Conf. of Amer. States*, p. 71.
- 21 BELGIUM—NICARAGUA. Ratifications exchanged at Guatemala of treaty of extradition signed at Guatemala, November 5, 1904. *Monit.*, June 1; *B. Usuel*, June 1.

April, 1907.

- 9 JAPAN. Amendment of Emigrant protection act. Emigrant transports are defined to be those that carry fifty or more to localities to be specified later. Hawaii, Mexico, Brazil, Chile, Peru, Argentine Republic and Canada have since been specified.
- 11 FRANCE—GREECE. Convention of extradition signed at Athens. French law authorizing ratification, July 1, 1907. *J. O.*, July 3.
- 15 GREAT BRITAIN—PANAMA. Ratifications exchanged at Panama of treaty of extradition signed at Panama August 25, 1906. *London Ga.* 1907, p. 5597; *Ga. Oficial* (Panama) January 27, April 18; *Treaty ser.*, 1907, No. 25.
- 18 GUATEMALA. Ratification of three conventions with Salvador, Honduras and Costa Rica, signed at San José, September 24 and 25, 1906, *q. v.* *B. A. R.*, June. Costa Rica has also ratified these. *Mensaje dirigido al Cong. nac. por el presidente...* January, 1907, Tegucigalpa; *Memoria...* *rel. ext.*, January, 1907, Tegucigalpa.
- 19 GUATEMALA. Ratification of convention signed at Rio de Janeiro August 23, 1906, in regard to patents, industrial models, literary and artistic property, etc.; also of the convention signed at Rio de Janeiro August 23 on international law. *B. A. R.*, June.
- 20 GUATEMALA. Ratification of two conventions signed at Rio de Janeiro August 13, 1906. Pecuniary claims and naturalized citizens. *B. A. R.*, June.
- 21 MEXICO. Ratification of convention for the creation of an International Law Commission signed at Rio de Janeiro August 23, 1906. *Diario oficial* June 25. *See April 19.*
- 22 BELGIUM—DENMARK. Declaration signed at Brussels concerning reciprocal protection of industrial designs and models. *Monit.*, August 8; *B. Usuel*, July 9. Ratifications exchanged at Brussels, July 9, 1907.
- 22 GUATEMALA. Ratification of Geneva convention signed July 6, 1906, for bettering the condition of wounded and sick soldiers in the field. *B. A. R.*, June. *See May 27, 1907.*
- 24 COLOMBIA—PERU. Approval by National Constituent Assembly of boundary treaty signed at Bogotá September 12, 1905. Submission of boundary difference to arbitration of the Pope. *B. A. R.*, August; *Diario oficial* (Bogotá) April 30. *See July 6, 1906.*
- 25 COLOMBIA—PERU. Approval by National Constituent Assembly of treaty of general arbitration signed at Bogotá, September 12, 1905. *Diario oficial*, April 30. *See July 6, 1906.*

April, 1907.

- 26 COSTA RICA—GREAT BRITAIN. Agreement for the exchange of postal money orders signed at San José. *Treaty ser.*, 1907, No. 17; *La Gaceta*, May 4; *B. A. R.*, June.
- 27 FRANCE—SPAIN. Ratifications exchanged at Bayonne of declaration signed at Bayonne June 1st, 1906, approving boundary procès-verbal. *J. O.*, June 3.
- 29 COLOMBIA—ECUADOR. Colombian law approving treaty signed at Quito August 10, 1905. Friendship, commerce and navigation. *Diario oficial*, May 4, 1907.
- 30 BOLIVIA—CHILE. Agreement signed at Santiago additional to treaty signed October 20, 1904 (*For. rel.* 1905; *Mem. del min. rel. est.* 1903-5, Santiago, 1907). Chile agrees to make definite annual payments in lieu of guaranteeing interests, relative to the construction of certain lines of railway. *Mem. rel ext.*, La Paz, 1907.

May, 1907.

- 3 GREAT BRITAIN—PERU. Agreement signed at Lima for the exchange of postal parcels. Signed at London, February 22, 1907. *Cd.*, 3671.
- 10 BRAZIL—ECUADOR. Treaty of commerce and river navigation, signed at Rio de Janeiro. *Ann. dipl.*, 5:188; *R. dipl.*, June 16.
- 11 SALVADOR. Ratification of the eighteen conventions signed at Rio de Janeiro at the Third International Conference of American States, 1906. *B. A. R.*, August.
- 14 GERMANY. Adhesion for its protectorates to the convention signed at Paris May 18, 1904, for the protection of women against the "traite des blanches." *Reichs-G.*, 1907, No. 42. Denmark has adhered for Iceland and the Danish West Indies; Great Britain has adhered for Canada, Newfoundland, Australia, Bahamas, Guinea, Trinidad, Barbados, Windward Islands, South Rhodesia, Senegambia, Gold Coast, North Nigeria, British Central Africa, Malta, Gibraltar, Ceylon, Seychelles, Jamaica, Sierra Leone, Somaliland, Hongkong, and St. Helena. Of non-signatory powers, Brazil adhered May 15, 1905, and Austria-Hungary January 18, 1905. *Staatsb.*, 1907, No. 79. See October 22, 1906, and December 31, 1906.
- 14 SPAIN—SWITZERLAND. Convention of arbitration signed at Berne. Ratifications exchanged at Berne, July 9. *Ga. de Madrid*, July 20.

May, 1907.

- 16 NETHERLANDS—UNITED STATES. Commercial agreement signed at Washington. Netherlands obtains reduction of duty on Dutch spirits under Section 3 of the Tariff Act approved July 24, 1897; United States obtains certain reductions of duty on American meats. A continuance of the most favored nation treatment which the United States has without treaty basis been receiving from Netherlands is virtually guaranteed during life of this agreement by privilege of denouncing.
- 17 BRAZIL—COLOMBIA. Ratification by Colombia of boundary treaty signed at Bogotá April 24, 1907. *Diario oficial*, May 25; *B. A. R.*, August. See April 24, 1907.
- 17 COLOMBIA—ECUADOR. Ratifications exchanged at Bogotá of telegraphic convention signed at Bogotá May 5, 1906. *Diario oficial* (Bogotá), May 22, 1907.
- 27 GERMANY. Ratification deposited at Berne of Geneva convention signed July 6, 1906. The German proclamation, May 29, 1907, recites the declaration made by the first German delegate at the first plenary session of the Conference June 12, 1906, whereby Germany assumed the rights and obligations under the 1864 convention of the following signatories: Prussia, Bavaria, Hesse, Saxony, Wurtemberg, and Mecklenburg-Schwerin. *Reichs-G.*, 1907, No. 25. Ratifications of the 1906 convention were deposited at Berne by Siam January 29; Russia and the United States February 9; Italy March 9 (*Ga. Ufficiale*, August 2, 1907); Great Britain, Switzerland and Kongo, April 16; Mexico, June 4 (*Ga. oficial*, August 21); Denmark, June 11; Brazil, June 18; Belgium and Luxemburg, August 27; Venezuela (*Treaty ser.*, 1907, No. 30); Nicaragua (*Treaty ser.*, 1907, No. 22). *B. Usuel*, August 15; *Monit.*, September 19. See April 22, 1907 and August 24, 1907.
- 28 BRAZIL. Decree adhering to convention signed at The Hague July 29, 1899, for the pacific settlement of international conflicts. *Diario oficial*, May 30. See June 14, 1907.
- 30 CHINA—JAPAN. Agreement signed at Peking respecting establishment of maritime customs office at Dalny, and inland waters steam navigation. A provisional arrangement, to be replaced in the spring of 1908 by a revised agreement supplemented by an ordinance, the former to be prepared by the Japanese minister and the Inspector General of Customs, and the latter by the

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Japanese authorities of the leased territory in communication with the Commissioner of Customs, at Dalny. *Japan Times*, June 11; *North China Herald*, June 14; *J. of the Amer. Assn. of China*, July, 1907, p. 42.

June, 1907.

- 3 GREAT BRITAIN—PORTUGAL. Exchange of notes approving boundary between possessions in East Africa from 18° 30' S. to the Limpopo River (350 miles). Of this line the north 235 miles was the arbitral award of January 30, 1897 (*State Papers*, 89:714), based on treaty signed at Lisbon June 11, 1891 (*State Papers*, 83:27), *Cd.*, 3285-19. The west boundary of Rhodesia on the Portuguese possessions was determined by Article IV of said treaty as found by the award of the King of Italy June, 1905, under the declaration signed at London August 12, 1903. *Treaty ser.*, 1907, No. 28; *Statesman's Year-book* 1907, p. 244.
- 4 FRANCE—ITALY. Ratifications exchanged at Paris of arrangement signed at Paris June 9, 1906, concerning reparation for workmen's injuries. *J. O.*, June 4, 21, and July 26.
- 5 ORANGE RIVER COLONY. Letters patent passed under the great seal of the United Kingdom; providing for the establishment of responsible government in Orange River Colony. *Cd.*, 3526. On same lines as that granted to Transvaal, December 6, 1906. *Cd.*, 3250.
- 6 PERMANENT INTERNATIONAL COMMISSION ON SUGARS met at Brussels. Great Britain declared her intention to discontinue giving effect to that provision of the International Sugar Convention signed March 5, 1902, requiring penalization of sugars declared to be bounty-fed. *Cd.* 3577; 3607; 3565. *Mém. dipl.*, June 9; *Diario oficial* (Mexico), September 27. See August 28.
- 6 GERMANY—GREECE. Greek Chamber of Deputies approves treaty of extradition. See March 12, 1907, and July 23, 1907. For a comparison of this treaty with other extradition treaties of Greece, and the amendment of this date to the Greek extradition law, see *R. générale de dr. int. public*, 14:632.
- 9 FRANCE—SPAIN. Declaration signed at Bayonne modifying declaration relative to oyster fishing signed at Bidassoa October 4, 1894. French law authorizing ratification July 16, 1907. *J. O.*, July 21.
- 10 INTERNATIONAL COUNCIL for the investigation of the sea met at London. *Geographical J.*, 30:87.

June, 1907.

- 10 FRANCE—JAPAN. Declaration and arrangement signed at Paris. Accords reciprocal most favored nation treatment to officers and subjects of Japan in French Indo-China and to subjects and protégés of French Indo-China in Japan, as to personal and property rights. Duration coextensive with treaty of commerce and navigation signed August 4, 1896. Mutual support in assuring peace and security in the parts of the Chinese Empire adjacent to territory where Japan and France exercise sovereignty. *Mém. dipl.*, June 23; *Q. dipl.*, 24:43, 334; *North China Herald*, 83:775, 691. China protested against part of this treaty. *Times*, August 24.
- 11 GERMANY. Ordinance for giving partial effect to the Law of February 15, 1900 (*State Papers*, 92:1063), relative to the abrogation of treaties with Samoa, Tonga and Zanzibar. *Reichs-G.*, 1907, No. 27; *Treaty ser.*, 1905, No. 20. The extraterritoriality provisions of the Zanzibar treaty signed December 20, 1885 (*Reichs-G.*, 1886, p. 261; *State Papers*, 76:247), are annulled, the German interests being passed under the jurisdiction of the British courts.
- 12 DENMARK—UNITED STATES. Agreement concluded by exchange of notes for reciprocal protection of trade-marks in China. Danish decree, August 13. "The law which the Danish court at Shanghai is called upon to enforce in the premises is the Danish law of April 11, 1890, amended by the law of December 19, 1898, and the ordinances of September 28, 1894, and September 12, 1902." Similar agreements have been effected between the United States and France, Netherlands, Italy, Belgium, Russia. *The international trade-mark question*, *J. of the Am. Asiatic Assn.*, 7:232; *China Ga.*, June 22, 1907.
- 12 TURKEY. Ratification deposited at The Hague of conventions and declarations signed at The Hague July 29, 1899.
- 12 EIGHTH INTERNATIONAL CONFERENCE OF RED CROSS. London.
- 13 GUATEMALA—UNITED STATES. Ratifications exchanged at Guatemala City of convention for reciprocal protection of patents, signed at Guatemala City November 10, 1906; ratification advised by the Senate December 13, 1906; ratified by the President March 6, 1907; ratified by Guatemala May 29, 1907; proclaimed July 9, 1907.
- 13 JAPAN—RUSSIA. Two conventions signed at St. Petersburg, (1) in regard to the railway station at Kwanchengtsu and (2) con-

June, 1907.

cerning the connecting service of Japanese and Russian railways in Manchuria, with additional articles. The Southern Manchuria Railway Company and the Chinese Eastern Railway Company on July 17, 1907, at Kwanchengtsu concluded an arrangement for transfer to the former company of the railway line south of the Kwanchengtsu station and the coal mines at Chybelin and Taotsiatun; and on July 21, at the same place, an agreement respecting the connection of the two lines. *North China Herald*, 84:438.

- 14 INTERNATIONAL. Protocol signed at The Hague by Germany, Austria-Hungary, Belgium, Bulgaria, China, Denmark, Spain, United States, Mexico, France, Great Britain, Greece, Italy, Japan, Luxemburg, Montenegro, Norway, Netherlands, Persia, Portugal, Roumania, Russia, Servia, Siam, Sweden, Switzerland, Turkey. Provides for the adhesion of non-signatory powers to the 1899 convention for the settlement of international disputes. *Staatsb.*, 1907, No. 73; *Treaty ser.*, 1907, No. 26. See June 15, 1907.
- 14 ITALY—SAN MARINO. Convention signed at Rome, additional to the convention signed June 28, 1897. Italian decree promulgating, July 19. *Ga. Ufficiale*, August 7.
- 14 NICARAGUA—UNITED STATES. Ratifications exchanged at Washington of treaty of extradition, signed at Washington March 1, 1905; ratification advised by the Senate March 16, 1905; ratified by the President June 11, 1907; ratified by Nicaragua April 26, 1907; proclaimed June 15, 1907.
- 15 INTERNATIONAL. Adhesions deposited at The Hague to the 1899 convention for the pacific settlement of international disputes, by Argentine Republic, Bolivia, Brazil, Chile, Colombia, Cuba, Dominican Republic, Guatemala, Haiti, Nicaragua, Panama, Paraguay, Peru, Venezuela. Adhesions were deposited by Uruguay, June 17; Salvador, June 20; Ecuador, July 3. For table of ratifications of and adhesions to the 1899 Hague conventions and declarations, see page 997 (revised to September, 1907). The declaration signed the same date respecting discharge of projectiles and explosives from balloons (*State Papers*, 91:1011) expired by limitation September 4, 1905. See June 14.
- 15 SECOND INTERNATIONAL PEACE CONFERENCE ASSEMBLES AT THE HAGUE. *Montluc: Mise au point de la deuxième conference de la*

Table * showing dates of deposit at The Hague of ratifications of and adhesions ** to Conventions and Declarations of July 29, 1899.

	CONVENTIONS.			DECLARATIONS.	
	Pacific Settlement of International Disputes.	Laws and Customs of War on Land.	Adaptation of Principles of Geneva Convention to Maritime Warfare.	Projectiles Using Suffocating Gases.	Expanding Bullets.
Argentine Republic.....	6-15-07	6-17-07	6-17-07	.....	.....
Austria-Hungary.....	9-4-00	9-4-00	9-4-00	9-4-00	9-4-00
Belgium.....	9-4-00	9-4-00	9-4-00	9-4-00	9-4-00
Bolivia.....	6-15-07	2-7-07	2-7-07	.....	.....
Brazil.....	6-15-07	2-25-07	2-25-07	.....	.....
Bulgaria.....	9-4-00	9-4-00	9-4-00	9-4-00	9-4-00
Chile.....	6-15-07	6-19-07	6-19-07	.....	.....
China.....	11-21-04	6-12-07	11-21-04	11-21-04	11-21-04
Colombia.....	6-15-07	1-30-07	1-30-07	.....	.....
Cuba.....	6-15-07	4-17-07	6-29-07	.....	.....
Denmark.....	9-4-00	9-4-00	9-4-00	9-4-00	9-4-00
Dominican Republic.....	6-15-07	4-13-07	6-29-07	.....	.....
Ecuador.....	7-3-07	7-31-07	8-5-07	.....	.....
France.....	9-4-00	9-4-00	9-4-00	9-4-00	9-4-00
Germany.....	9-4-00	9-4-00	9-4-00	9-4-00	9-4-00
Great Britain.....	9-4-00	9-4-00	9-4-00	8-30-07	8-30-07
Greece.....	4-4-01	4-4-01	4-4-01	4-4-01	4-4-01
Guatemala.....	6-15-07	5-2-06	4-6-03	.....	.....
Haiti.....	6-15-07	5-24-07	6-29-07	.....	.....
Honduras.....	.....	8-21-06	8-21-06	.....	.....
Italy.....	9-4-00	9-4-00	9-4-00	9-4-00	9-4-00
Japan.....	10-6-00	10-6-00	10-6-00	10-6-00	10-6-00
Korea.....	.....	5-17-03	2-7-03	.....	.....
Luxemburg.....	7-12-01	7-12-01	7-12-01	7-12-01	7-12-01
Mexico.....	4-17-01	4-17-01	4-17-01	4-17-01	4-17-01
Montenegro.....	10-16-00	10-16-00	10-16-00	10-16-00	10-16-00
Netherlands.....	9-4-00	9-4-00	9-4-00	9-4-00	9-4-00
Nicaragua.....	6-15-07	5-17-07	5-17-07	.....	.....
Norway.....	9-4-00	7-5-07	9-4-00	9-4-00	9-4-00
Panama.....	6-15-07	7-20-07	7-22-07	.....	.....
Paraguay.....	6-15-07	4-12-07	6-29-07	.....	.....
Persia.....	9-4-00	9-4-00	9-4-00	9-4-00	9-4-00
Peru.....	6-15-07	11-24-03	11-24-03	.....	.....
Portugal.....	9-4-00	9-4-00	9-4-00	9-4-00	8-29-07
Roumania.....	***9-4-00	9-4-00	9-4-00	9-4-00	9-4-00
Russia.....	9-4-00	9-4-00	9-4-00	9-4-00	9-4-00
Salvador.....	6-20-07	6-20-02	6-20-02	.....	.....
Servia.....	***5-11-01	5-11-01	5-11-01	5-11-01	5-11-01
Siam.....	9-4-00	9-4-00	9-4-00	9-4-00	9-4-00
Spain.....	9-4-00	9-4-00	9-4-00	9-4-00	9-4-00
Sweden.....	9-4-00	7-5-07	9-4-00	9-4-00	9-4-00
Switzerland.....	12-29-00	6-20-07	12-29-00	12-29-00	12-29-00
Turkey.....	6-12-07	6-12-07	6-12-07	6-12-07	6-12-07
United States.....	***9-4-00	4-9-02	9-4-00	.....	.....
Uruguay.....	6-17-07	6-21-06	6-21-06	.....	.....
Venezuela.....	6-15-07	3-1-07	3-1-07	.....	.....

* See June 15, 1907.

** Italics denote adhesions.

*** With reservations.

June, 1907.

Haye, R. dr. int. y pol. ext., 3:93; *Tardieu: La conference de la Haye, R. des deux mondes*, 39:803; *The second Hague conference, Spectator*, June 22; *Barclay: The second Hague peace conference, Fortnightly R.*, 81:967 and 82:551; *Mahan: The Hague conference and the practical aspect of war, National R.*, 49:688; *Bartholdt: The calling of the second conference of The Hague, Independent*, 63:65. For proceedings, see *Courrier de la Conférence de la Paix* (Stead, ed.), The Hague; *Mém. dipl.*, June 23 *et seq.* For the protest of the Korean delegation, *R. dipl.*, July 14. For circular note addressed to the powers on the subject of the Second Conference of Peace, April 3, 1907, see *R. gen. dr. int. public*, 1907, Documents, p. 24. The following conventions were agreed upon for signature: (1) the peaceful regulation of international conflicts; (2) providing for an international prize court; (3) regulating the rights and duties of neutrals on land; (4) regulating the rights and duties of neutrals at sea; (5) covering the laying of submarine mines; (6) the bombardment of towns from the sea; (7) the collection of contractual debts; (8) transformation of merchantmen into warships; (9) treatment of captured crews; (10) inviolability of fishing boats; (11) inviolability of postal service; (12) application of Geneva Convention and Red Cross to sea warfare; and (13) laws and customs of war on land. The right to sign these conventions will be open until June 30, 1908. Adjourned October 18. *Davis: The second peace conference at The Hague, Independent*, October 31.

- 16 RUSSIA. Imperial ukase dissolving Duma, setting new elections for September 14, and convocation of new Duma for November 14, 1907. For text, see *Mém. dipl.*, June 23; *Q. dipl.*, 24:51. See *May 10, 1906*, and *March 5, 1907*.
- 17 FIRST INTERNATIONAL CONFERENCE ON THE SLEEPING SICKNESS, held at London. Adjourned June 24. Participated in by Germany, Great Britain, Italy, Kongo, Portugal and Sudan. Considered measures to combat the sleeping sickness in tropical Africa. *Cd.*, 3778.
- 17 INTERNATIONAL COLONIAL INSTITUTE SESSION at Brussels. Adjourned June 19. *Piolet: L'institut colonial international, Q. dipl.*, 24:31.

June, 1907.

- 18 NICARAGUA. Adhesion to universal postal convention, final protocol and administrative regulations signed at Rome, May 26, 1906. *Reichs-G.*, 1907, No. 41.
- 21 FRANCE—JAPAN. French decree ratifying arrangement and declaration signed at Paris, June 10, 1907, *q. v. J. O.*, June 23; *Cd.*, 3578.
- 21 FRANCE—SIAM. Ratifications exchanged at Paris of treaty signed at Bangkok March 23, 1907. *Mém. dipl.*, May 12 for text; *de Caix: Le traité franco-siamois*, *Q. dipl.*, 23:609, with map; *Harmand: Le traité franco-siamois et le Cambodge*, *R. des deux mondes*, 40:86; *J. O.*, June 23, July 2. See March 23.
- 22 VENEZUELA. Ratification of sanitary convention signed at Washington October 14, 1905. *B. A. R.*, August; *Ga. oficial*, June 22.
- 22 VENEZUELA. Ratification of Geneva convention of July 6, 1906. *Ga. oficial*, June 22.
- 24 GREAT BRITAIN—UNITED STATES. Agreement concluded at Tangier by exchange of notes according mutual protection of patents of invention in Morocco. *Treaty ser.*, 1907, No. 23.
- 24 CUBA. Decree of adhesion to the convention signed at Geneva August 22, 1864, to ameliorate the condition of soldiers wounded while in the field. *Ga. oficial*, June 25, July 3, August 26; *Treaty ser.*, 1907, No. 20. The Dominican Republic, Haiti, Panama (*Treaty ser.*, 1907, No. 23), Ecuador (*Treaty ser.*, 1907, No. 29), and Paraguay also have recently adhered to this convention. *Monit.*, July 11, August 2 and 16. See April 16, 1907.
- 24 DOMINICAN REPUBLIC. Decree adhering to universal postal convention signed at Rome May 26, 1906.
- 24 GERMANY—TURKEY. Ratifications exchanged at Constantinople of the articles and procès-verbal of signature signed at Constantinople April 25, 1907, additional to treaty signed at Constantinople August 26, 1890 (*State Papers*, 82:128). *Reichs-G.*, 1907, No. 28.
- 25 BRAZIL—NETHERLANDS. Ratification by Brazil of treaty signed at Rio de Janeiro May 8, 1906. *Diario oficial*, June 27. Boundary between Brazil and Surinam.
- 28 BELGIUM—KONGO. Convention for the exchange of postal money orders signed at Brussels. *Monit.*, July 25; *B. Usuel*, June 28.
- 28 CHINA. Edict respecting use of opium. *North China Herald*, 83: 749, 767, 768, 771.

June, 1907.

- 28 ITALY—RUSSIA. Treaty of commerce signed at St. Petersburg. Duration, ten years. *Mém. dipl.*, June 30.
- 29 MOROCCO. Capture of Sir H. Maclean, caid, by Raisuli. *Q. dipl.*, 24:135; *Times*, September 20. Raisuli's terms for release of Maclean were: The governorship of North Morocco from Larache to forty miles south of Tetuan on the Mediterranean; an indemnity of over \$500,000 for losses since his eviction from the governorship of the Fahs tribe; the dismissal from office of the Minister of War and the Sultan's second representative in Tangier; the imprisonment of the commanders of the late expedition which fought against the Khmas tribe; the release of all mountaineer prisoners; a consignment of arms and ammunition. Rejected by Britain.

July, 1907.

- 1 GREECE—ROUMANIA. Publication of Roumanian royal decree repealing decree of July 8, 1906, prohibiting imports from Greece and increasing taxes on Greeks residing in Roumania. Text of the two decrees in *R. dipl.*, July 28, 1907. Greece issued similar decrees. For diplomatic correspondence of the dispute, *Arch. dipl.*, 99:9. *Lévides: Le droit d'intervention des grandes puissances. A propos du conflit gréco-roumain, R. gen. dr. int. public*, 13:582; *Kebedgy: Le conflit gréco-roumain, R. dr. int. et leg. comp.* 1905, p. 679.
- 1 UNITED STATES. Immigration Act approved February 20, 1907, in effect. The head tax is increased to \$4; exemption is extended to all aliens who have resided in Canada, Newfoundland, Cuba and Mexico for the twelve months immediately preceding entrance; the excluded classes are increased by the addition of (a) imbeciles, (b) feeble-minded persons, (c) persons afflicted with tuberculosis, (d) persons with such defect as to affect ability to earn a living, (e) believers in polygamy, (f) females coming for any immoral purpose, (g) persons whose passage was paid by corporation or government, (h) children under sixteen unaccompanied by a parent. *Stat. at L.*, 34:898; *Ward: The new immigration act, North Am. R.*, 185:587.
- 1 GERMANY—UNITED STATES. Commercial treaty signed April 22/May 2, 1907, takes effect. *Reichs-G.*, 1907, No. 26. *Stone: Most favored nation relations between Germany and the United States, North Am. R.*, 182:433. See May 2, 1907.

July, 1907.

- 2 GREAT BRITAIN—SWEDEN. Agreement signed at London, declaring addition to Article II of extradition treaty of June 26, 1873, between Great Britain and Norway and Sweden, and providing that said treaty shall remain in force between Great Britain and Sweden. British order in council, August 12, putting in effect from August 26, 1907, *London Ga.*, 1907, p. 5595; *Treaty ser.*, 1907, No. 24. See February 18, 1907.
- 6 GREAT BRITAIN. Order in council suspending the operation of Extradition Acts, 1870 to 1906, within Canada so long as the Canadian Extradition Act of 1906 continues in force. *London Ga.*, 1907, p. 4764. See February 11, 1907.
- 6 CYPRUS. British order in council making "further provision for the exercise of the power and jurisdiction vested by treaty in His Majesty the King in and over the Island of Cyprus." Cyprus, nominally Turkish, is administered by Great Britain under a convention signed at Constantinople June 4, 1878. *London Ga.*, September 13.
- 6 GREAT BRITAIN. The Nyasaland Order in Council, 1907. Changes name of British Central Africa Protectorate to Nyasaland Protectorate, and establishes governor, executive council and legislative council therefor. *London Ga.*, September 3.
- 8 DOMINICAN REPUBLIC—UNITED STATES. Ratifications exchanged at Washington of convention signed at the city of Santo Domingo February 8, 1907; ratification advised by Senate February 25, 1907; ratified by President June 22, 1907; ratified by President of the Dominican Republic June 18, 1907; proclaimed by the United States, July 25, 1907. Provides for the assistance of the United States in the collection and application of the customs revenues of the Dominican Republic. *B. A. R.*, April and July, 1907; *Ga. Oficial*, July 24, 1907. See February 8, 1907, and July 25, 1907.
- 8 CHINA. Decree calling for suggestions respecting introduction of parliamentary representation and constitution. *North China Herald*, 84:61, 80; *R. of Reviews*, February 1907; *Foster: Present conditions in China*, *National geographic mag.*, 17:651. See September 1, 1906.
- 9 GREAT BRITAIN—ITALY. Agreement effected at Rome by exchange of notes, respecting the importation of drugs and medical preparations. *Treaty ser.*, 1907, No. 31.

July, 1907.

- 10 FRANCE. Ratification of protocol signed at Constantinople April 25, 1907, respecting increase of Turkish customs duties, *J. O.*, July 11; for the French diplomatic correspondence, *Mém. dipl.*, July 14 *et seq.* Pinon: *La question de Macédoine*, *R. des deux mondes*, May 15, 1907 *et seq.*; Kebedgy: *Les événements de Bulgarie et de Roumanie orientale au point de vue du droit international*, *R. dr. int. et de leg. comp.*, 9:5; *B. de statistique et de leg. comparée*, 62:6. See April 25, 1907.
- 10 FRANCE—GREECE. Ratifications exchanged at Athens of extradition convention signed at Athens April 11, 1906. French decree of promulgation, July 31. *J. O.*, August 4. See June 6, 1907.
- 12 FRANCE—GERMANY. French law approving treaty signed at Paris April 8, 1907, to replace convention of April 19, 1883. Protection of literary and artistic property. *Dr. d'auteur*, 19:113, 132; 20:66, 93; *J. O.*, July 14.
- 12 DENMARK. Royal Decree declaring the provisions of the law of March 29, 1904 (*Dr. d'auteur* 1904, p. 54), concerning copyright applicable to the literary and artistic works of Austrian subjects if protected by Austrian law. *Dr. d'auteur*, 20:106. See July 18.
- 12 TURKEY. New tariff, increasing customs import duty from 8 to 11 per cent., came into force.
- 18 AUSTRIA. Order of the minister of justice extending under the law of February 26, 1907 (*Feuille imp. des lois*, No. 58), the provisions of the law of December 26, 1895, to literary and artistic works of Danish subjects, protected in Denmark. To take effect August 1, 1907. *Dr. d'auteur*, 20:106.
- 19 KOREA. Emperor Yi-Yeung abdicates in favor of the Crown Prince. *The coup d'état at Seoul*, *Spectator*, July 27; *R. des deux mondes*, 40:720. For text of Edict of Abdication, *Q. dipl.*, 24:195; *Mém. dipl.*, July 28; *Times*, July 22. Yi Syek, born March 25, 1874, succeeded to the throne, the ceremonies taking place July 20.
- 23 FRANCE—ROUMANIA. Ratifications exchanged at Paris of arrangement signed at Paris March 6, 1907, concerning protection of literary, artistic and industrial property. *J. O.*, July 14, August 1; *Dr. d'auteur*, 20:94.
- 23 GERMANY—GREECE. Ratifications exchanged at Athens of extradition treaty signed at Athens March 12, 1907. By exchange of notes dated May 30, 1907, the meaning of Article II was defined. *Reichs-G.*, 1907, No. 38. See June 6, 1907.

July, 1907.

- 25 JAPAN—KOREA. Convention signed at Seoul. The first article places Korea "under the secure guidance of Japan"; Article II requires Japanese consent to all new laws; Article III necessitates a similar approval for all appointments; and Article IV makes only persons recommended by the Japanese Resident eligible for office in the Korean government. *Times*, July 26; *Index: Korea—an example of national suicide*, *Forum*, 39:281; *Documents*, p. 397.
- 25 DOMINICAN REPUBLIC—UNITED STATES. Executive order of the President of the United States promulgating general regulations to take effect August 1, 1907, for the government of the Dominican customs receivership under and in pursuance of the convention signed at Santo Domingo, February 8, 1907, *q. v.* *Ga. oficial*, August 28. The debate on the Dominican resolution of May 3 (*Ga. oficial*, June 12) is in *Ga. oficial* June 26 to August 28. See also *May 3, July 8, 1907*, and *Documents*, p. 408.
- 25 INTERNATIONAL. Meeting at Brussels of Permanent Committee on Sugars. See *August 28, 1907*.
- 27 FRANCE—HAITI. French law authorizing ratification of treaty signed January 30, 1907, *q. v.* *J. O.*, March 31, July 31, August 3; *B. A. R.*, May; *B. int. des douanes*, No. 108, supplement 4; *Ann. dipl.*, 5:100. See *January 30*.
- 27 NINTH INTERNATIONAL GEOGRAPHICAL CONGRESS, at Geneva. *Geographical J.*, 30:337; *Le Globe* (Geneva Geographical Society), 46, No. 2.
- 28 JAPAN—RUSSIA. Convention and protocol relative to fisheries in the Far East. Signed at St. Petersburg. Term, twelve years. Ratified by Russia July 31. Russia grants to Japan the right of fishing and of collecting and treating marine products, except seals and sea otters, in the Sea of Japan, the Sea of Okhotsk and Bering Sea, rivers and bays being excepted. The catching of fish and the treatment of marine products are permitted to Japanese subjects on tracts of land specially assigned for the purpose. These tracts will be publicly offered for lease without distinction of nationality to Japanese and Russians, who are placed on a footing of equality as regards taxes and other dues. Fish and marine products for export from the coastal territory and Amur district are not to be taxed, either by Russia or Japan. See *May 4, 1907*.

July, 1907.

- 28 JAPAN—RUSSIA. Treaty of commerce and navigation signed at St. Petersburg. *North China Herald*, 85:702.
- 29 ANNAM. Thanh Thai, King since January 31, 1889, dethroned by France. A minor son succeeds him. *R. dipl.*, September 29. By treaty signed June 6, 1884, and ratified at Hué February 23, 1886, a French protectorate was established over Annam. *Almanach de Gotha*, 1888, p. 731.
- 30 JAPAN—RUSSIA. Convention signed at St. Petersburg. Two articles, the first containing mutual engagements to respect the present territorial integrity of each other, and rights under present treaties with China that are not contrary to equal treatment principle of Portsmouth treaty; the second containing recognition of the independence and territorial integrity of China, as well as equal treatment principle for commerce and industries therein for all nations, and an engagement to maintain the *status quo* and respect for this principle by all pacific means. *J. des débats*, August 16; *Mém. dipl.*, August 18; *Times*, August 15; *Text, Q. dipl.*, 24:335, and *Documents*, p. 396.
- 30 MOROCCO. Massacre of Europeans by Moors at Casablanca. On August 4, the French consulate was fired on. *Q. dipl.*, 24:246, 318, 379, 409, 453 (map); *R. des deux mondes*, 41:229; *The crisis caused by Morocco*, *Spectator*, August 31; *de Caix: L'affaire du Maroc*, *Q. dipl.*, 24:281; *Bonsal: The crumbling empire of the Moors*, *North Am. R.*, 186:262.
- 30 Ceremonies of placing the first stone of the Palace of Peace at The Hague, under presidency of M. de Nelidoff. Jonkheer van Karnebeek pronounced the discourse. *Le palais de la paix*, *Mém. dipl.*, August 4; *Times*, July 31. The building is a gift of Andrew Carnegie.
- 31 FRANCE—GREAT BRITAIN. French law authorizing President to ratify convention signed June 30, 1906, and an act of same date additional to the convention signed September 21, 1887. Exchange of money orders between colonies. *J. O.*, August 3.
- 31 FRANCE—GERMANY. Ratifications exchanged at Paris of convention signed at Paris April 8, 1907. Protection of literary and artistic property. Replaces convention signed April 19, 1883. *Reichs-G.*, 1907, No. 35; *Dr. d'auteur*, May 1907; *J. O.*, September 5.

August, 1907.

- 1 PERSIA—TURKEY. Turks attack Persian camp at Tuli. *Mém. dip.*, August 18. The present frontier question originated in 1905 through the action of the Belgian Customs Director at Urumiah, who in that year established a customs post at Old Lajan, between Urumiah and Suj Bulak. The Kurds resented the arrangement and appealed to Turkey, which claimed and occupied the place. In 1906 the Turks marched into Mergavar and Tergavar, inhabited by Begzadeh Kurds. Since the murder of the American missionary Labaree March 9, 1904 (*For. rel.*, 1904, 1905), the Begzadeh Kurds have been plundering. For an account of the Persian expeditionary force of 1907 under Mejdes Sultanes against the Kurds, see *Times*, September 12. *Le conflit turco-persan, R. dipl.*, August 18.
- 1 AUSTRIA—DENMARK. Copyright agreement takes effect. See July 12 and 18.
- 1 BULGARIA—GREAT BRITAIN. Agreement for the exchange of postal and telegraph money orders takes effect. *Cd.*, 3721.
- 3 UNITED STATES. Promulgation of convention signed at Geneva July 6, 1906, for the amelioration of the condition of the wounded of armies in the field. Ratification advised by the Senate December 19, 1906; ratified by the President of the United States January 2, 1907; ratification deposited with the Government of the Swiss Confederation February 9, 1907. See May 27, 1907.
- 5 INTERNATIONAL HOUSING CONGRESS. Eighth meeting, at London. Instituted in 1889. Previous meetings in Paris (twice), Antwerp, Bordeaux, Brussels, Düsseldorf, and Liège. *Times*, August 5.
- 5 AUSTRALIA. Accession to the industrial property convention signed at Paris March 20, 1883, as modified by the additional Act signed at Brussels December 14, 1900. *Treaty ser.*, 1907, No. 21. The notification of accession was made to the Swiss government June 28, 1907, and notified by the Swiss Federal Council to the other States parties to the Union, July 5. By the stipulations of Article XVI of the revised convention this takes effect one month after the latter notification. *B. Usuel*, July 5.
- 5 SECOND INTERNATIONAL CONGRESS ON SCHOOL HYGIENE. London. *Spectator*, August 10; *Times*, August 3, 6 and 7. The first congress was held at Nuremberg, April, 1904.
- 5 COLOMBIA. Ratification of universal postal convention signed at Rome May 26, 1906. *B. A. R.*, September.

August, 1907.

- 12 THIRD INTERNATIONAL ESPERANTO CONGRESS assembles at Cambridge. Adjourned August 17.
- 13 DENMARK—UNITED STATES. Danish decree concerning reciprocal protection of trade-marks in China. *See June 12.*
- 13 GERMAN SOUTHWEST AFRICA. Morenga, Damaraland Hottentot, chief of insurrectionary movement, crossed German frontier from Cape Colony. *Q. dipl.*, 24:338.
- 13 CHINA. Decree respecting constitution. *North China Herald*, August 16.
- 14 FRANCE. Law approving conventions and arrangements of the universal postal union signed at Rome May 26, 1906. *J. O.*, August 23.
- 14 EIGHTH ZIONIST CONGRESS, at The Hague. Adjourned August 21. *Q. dipl.*, 24:334; *Bentwich: The progress of Zionism, Fortnightly R.*, 64:928; *Simon: The return of the Jews to Palestine, Nineteenth Century*, September 1898; *Mém. dipl.*, August 18; *Nation*, 85:275.
- 14 ITALY. Deposit at The Hague of ratification of hospital ship convention signed at The Hague December 21, 1904. Spain deposited ratification May 10, 1907. *Reichs-G.*, 1907, No. 42; *Staatsb.*, 1907, No. 94; *J. O.*, July 21, 1907. *See March 26, 1907.*
- 15 INTERNATIONAL PRISON COMMISSION met at Lausanne, Switzerland. Adjourned August 18. Object of meeting: To choose and formulate the questions for study and research which are to constitute the basis of the program of the Eighth International Prison Congress to be held at Washington in 1910.
- 16 MOROCCO. Mulai Hafid proclaimed Sultan at Marakesh. *Times*, August 26.
- 17 CUBA. Ratification of agreement signed at Rome June 7, 1905, respecting creation of an International Institute of Agriculture. Approved by Senate of Cuba, April 20, 1906. *Ga. oficial*, August 29, 1907; *Times*, May 20, 21, and August 29, 1907; *R. dr. int. y pol. ext. (crónica)*, 2:18. Mauritius and New Zealand also have recently adhered to the convention and are classed in groups IV and V respectively. *See August 16, 1906.*
- 18 INTERNATIONAL SOCIALIST CONGRESS meets at Stuttgart. *Mém. dipl.*, August 25 and September 1; *Bourdeau: L'internationale socialiste au congrès de Stuttgart, R. des deux mondes*, 41:400;

August, 1907.

- id.*, 469; Vandervelde: *The significance of the Stuttgart congress*, *Times*, September 12; *Independent*, August 29. Adjourned August 24. *R. des deux mondes*, 41:236. Next Congress at Copenhagen, 1910.
- 24 TURKEY. Note to Switzerland adhering to Geneva convention of July 6, 1906, with the reservation that Turkey will use in its armies the emblem of the red crescent instead of the red cross. *See May 27, 1907.*
- 25 INTERNATIONAL ANARCHIST CONGRESS opened at Amsterdam. Proceedings, *Mém. dipl.*, September 8.
- 26 INTERNATIONAL LITERARY AND ARTISTIC ASSOCIATION. Twentieth session, at Neufchatel. Discussion of project revision of the Convention of Berne, under the form taken at Weimer session (1903), with the proposition formulated at the Liège and Bucharest sessions. *Dr. d'auteur*, 20:102, 111. Adjourned August 29.
- 26 ELEVENTH INTERNATIONAL CONGRESS OF THE INSTITUTE OF STATISTICS opened at Copenhagen. *Mém. dipl.*, September 1 and 8. Adjourned August 31.
- 26 BELGIUM—KONGO. The plenipotentiaries charged with drawing up a treaty of cession held their first meeting. *R. dipl.*, September 1. *See May 22, 1907.*
- 27 GERMANY—NETHERLANDS. Treaty relating to insurance against accidents signed at Berlin.
- 28 INTERNATIONAL. Additional Act, drawn up by Permanent Commission of the Sugar Convention of March 5, 1902, signed at Brussels by the diplomatic representatives accredited to Belgium by the adherent powers. The international union is extended for five years from September 1, 1908; from which date Great Britain will be released from penalizing bounty-fed sugars, but the other contracting States can require that sugar refined in the United Kingdom and exported to them be accompanied by a certificate stating that no part thereof had origin in a country according a sugar bounty on production or exportation. *Procès-verbaux des séances tenues pendant l'exercice 1906-1907*, Brussels, 1907. *See June 6, 1907.*
- 29 INTERNATIONAL LAW ASSOCIATION. Twenty-fourth conference at Portland, Maine. The earlier meetings were held at (1) Brussels, 1873; (2) Geneva, 1874; (3) The Hague, 1875; (4) Bremen, 1876; (5) Antwerp, 1877; (6) Frankfort, 1878; (7) London,

August, 1907.

- 1879; (8) Berne, 1880; (9) Cologne, 1881; (10) Liverpool, 1882; (11) Milan, 1883; (12) Hamburg, 1885; (13) London, 1887; (14) Liverpool, 1890; (15) Genoa, 1892; (16) London, 1893; (17) Brussels, 1895; (18) Buffalo, 1899; (19) Rouen, 1900; (20) Glasgow, 1901; (21) Antwerp, 1903; (22) Christiania, 1905; (23) Berlin, 1906.
- 30 GREAT BRITAIN. Accession to the declarations signed at The Hague, July 29, 1899, respecting (1) expanding bullets, (2) asphyxiating gases. *Treaty ser.*, 1907, No. 32.
- 31 PERSIA. Prime minister, Amin-es-Sultan, assassinated. *Q. dipl.*, 24:398.
- 31 GREAT BRITAIN—RUSSIA. Convention signed at St. Petersburg, containing arrangements on the subject of Persia, Afghanistan, and Thibet. *Cd.*, 3750; *Documents*, p. 398. Ratifications exchanged at St. Petersburg, September 23. *Spectator*, September 28; map in *Independent*, October 10; *Q. dipl.*, 24:471; *National R.*, 50:157; *Fortnightly R.*, 32:535.

HENRY G. CROCKER.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

UNITED STATES ¹

Canada, select list of books, with reference to periodicals, on reciprocity with. 1907. 14 p. *Library of congress*. Paper, 10c.

Chinese, treaty, laws and regulations governing admission of; regulations approved Feb. 26, 1907. 62 p. *Bureau of immigration and naturalization*.

Consular service. Executive order [amending consular regulations of 1896]. 1 p. *President*.

Consular service. Executive order [amending sec. 4 of order of June 27, 1906]. 1 p. *President*.

Continental Congress, Journals of the, 1774-89. Vols. 7-8. *Library of congress*. Cloth, \$1.00 each.

Cuba, Acts of Congress, treaties, proclamations, and decisions of the Supreme Court of the United States relating to noncontiguous territory and Cuba and to military affairs. 1907. xxvii, 380 p. *Bureau of insular affairs*. (S. doc. 204.)

Cuban pacification. Report of secretary of war and assistant secretary of state, Dec. 11, 1906. p. 444-543. *Bureau of insular affairs*. Paper, 15c.

Dominican Republic, convention between the United States and the, providing for assistance of the United States in the collection and application of customs revenues of the Dominican Republic. Feb. 8, 1907, proclaimed July 25, 1907. 8 p. *Dept. of state*.

French alliance in American revolution, list of works relating to. 1907. 40 p. *Library of congress*. Paper, 10c.

Germany, commercial agreement between the United States and. 1907. 24 p. *Bureau of manufactures*. (Tariff series, 5.)

Germany. Proclamation [reciprocity with Germany]. 1907. 2 p. *President*.

¹When prices are given, the document in question may be obtained for the amount mentioned from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Germany, regulations provided for in commercial agreement between, and the United States. 1907. 2 p. *Treasury dept.* (Dept. circular 36.)

Guatemala, convention between the United States and, for reciprocal protection of patents. Signed at Guatemala City, Nov. 10, 1906, proclaimed July 9, 1907. 3 p. *Dept. of state.*

Honduras, treaty between the United States and. Comayagua, July 4, 1864, proclaimed May 30, 1865. Edition, 1907. 17 p. *Dept. of state.*

Hospital ships. Convention between the United States and certain powers for exemption of hospital ships in time of war from payment of all dues and taxes imposed for the benefit of the state, signed at The Hague, Dec. 21, 1904, proclaimed May 21, 1907. 10 p. *Dept. of state.*

Immigration laws and regulations of July 1, 1907. 76 p. *Bureau of immigration and naturalization.* Paper, 10c.

Immigration, list of books, with references to periodicals, on. 3d ed. 1907. 157 p. *Library of congress.* Paper, 25c.

International Red Cross convention. Convention for the amelioration of the condition of wounded of armies in the field. Signed at Geneva, July 6, 1906, proclaimed Aug. 3, 1907. 30 p. *Dept. of state.*

Mexico, convention between the United States and, for elimination of bancos in Rio Grande from effects of article 2 of treaty of Nov. 12, 1884, signed at Washington, Mar. 20, 1905, proclaimed June 5, 1907. 7 p. *Dept. of state.*

Mexico, proceedings of the international boundary commission, United States and. Relating to the placing of additional monuments to more perfectly mark the international boundary line through the town of Naco, Arizona-Sonora. 1907. 18 p., map. *Dept. of state.*

Morocco, protection of patents in, agreement [between the United States and Great Britain] effected by exchange of notes. Feb. 4-June 24, 1907. 3 p. *Dept. of state.*

Nicaragua, treaty between the United States and, for the extradition of criminals. Signed at Washington, Mar. 1, 1905, proclaimed June 15, 1907. 11 p. *Dept. of state.*

Passports. Executive order [governing granting and issuing of passports in the United States]. 3 p. *President.*

Servia, conventional tariff of, based on treaties with Great Britain, France and Italy. 1907. 9 p. *Bureau of manufactures.* (Tariff series, 4.) Paper, 5c.

State, dept. of, rules and regulations governing the. 1907. 55 p. *Dept. of state.* (S. doc. 359.)

GREAT BRITAIN ¹

Aliens act, 1905. First annual report of H. M. inspector; with a statement with regard to the expulsion of aliens. For 1906. *Home dept.* (cd. 3473.) 6d.

Australasia. Further correspondence relating to the convention with France, dated 20th October, 1906, respecting the New Hebrides. (cd. 3525.) 2d.

Australia, accession of the Commonwealth of, to the industrial property convention of 1883, as modified by the additional act of 1900. August 5, 1907. *Foreign office.* (cd. 3609.) $\frac{1}{2}$ d.

Belgium, convention between the United Kingdom and, supplementing article XIV. of the treaty of extradition of October 29, 1901. Signed at London, March 5, 1907. *Foreign office.* (cd. 3580.) $\frac{1}{2}$ d.

Commercial attachés and commercial agents, report on the system of British. 1907. *Foreign office.* (cd. 3610.) $\frac{1}{2}$ d.

Costa Rica, agreement between the United Kingdom and the Republic of, for the exchange of postal money orders. Signed at San José de Costa Rica, April 26, 1907. *Foreign office.* (cd. 3581.) $\frac{1}{2}$ d.

Danube, report on the operations of the European commission of the, during the years 1894-1906, with a résumé of its previous history. *Foreign office.* (cd. 3646.) 6d.

Emigration. Memorandum on the history and functions of the emigrants' information office. 1907. *Colonial office.* (cd. 3407.) 6d.

France, additional agreement between the United Kingdom and, respecting the parcel post service between British India and France. Signed at Paris, March 30, 1907. *Foreign office.* (cd. 3499.) $\frac{1}{2}$ d.

France, dispatch from H. M. Ambassador at Paris transmitting the treaty between, and Siam, signed at Bangkok, March 23, 1907. *Foreign office.* (cd. 3578.) $\frac{1}{2}$ d.

Germany, exchange of notes between the United Kingdom and, respecting the estates of deceased seamen. Feb. 16, March 21, 1907. *Foreign office.* (cd. 3452.) $\frac{1}{2}$ d.

International disputes, protocol for the accession of non-signatory powers to the convention of July 29, 1899, for the pacific settlement of. June 14, 1907. *Foreign office.* (cd. 3649.) $\frac{1}{2}$ d.

¹ Official publications of Great Britain, India and many of the British colonies may be purchased of P. S. King & Son, Orchard House, 2 and 4 Great Smith Street, Westminster, London.

Macedonian financial commission, despatches from the British adviser on the. 1907. *Foreign office.* (cd. 3497.) 5d.

Nicaragua, accession of, to the convention signed at Geneva, July 6, 1906, for the amelioration of the condition of the wounded and sick in armies in the field. June 17, 1907. *Foreign office.* (cd. 3644.) $\frac{1}{2}$ d.

Norway, agreement between the United Kingdom and, respecting the mutual surrender of fugitive criminals. Signed at Christiania. Feb. 18, 1907. *Foreign office.* (cd. 3606.) $\frac{1}{2}$ d.

Panama, accession of, to the convention signed at Geneva, August 22, 1864, for the amelioration of the condition of the wounded in armies in the field. July 29, 1907. *Foreign office.* (cd. 3645.) $\frac{1}{2}$ d.

Panama, treaty between the United Kingdom and, for the mutual surrender of fugitive criminals. Signed at Panama, August 25, 1906. *Foreign office.* (cd. 3648.) 1d.

Persian coast and islands order in council, 1907. 25 p. (Statutory rules and orders, 1907, no. 382.) 2d.

Peru, agreement between the Post office of the United Kingdom and the Post office of, for the exchange of postal parcels. 1907. *Post office.* (cd. 3671.) $2\frac{1}{2}$ d.

Peru, treaty between the United Kingdom and, for the mutual surrender of fugitive criminals. Signed at Lima, January 26th, 1904. *Foreign office.* (cd. 3503.) $1\frac{1}{2}$ d.

South-eastern Europe, further correspondence respecting the affairs of. [Dec. 1905 to March 1907.] *Foreign office.* (cd. 3454.) 1s. 10d.

Spain. Notes exchanged with the Spanish government respecting the maintenance of the territorial "Status quo" in the Mediterranean and the east Atlantic ocean, May 16, 1907. *Foreign office.* (cd. 3576.) $\frac{1}{2}$ d.

Stuart papers, calendar of, belonging to H. M. the King, preserved at Windsor castle. Vol. 3. *Historical manuscripts commission.* (cd. 3430.) 2s. 10d.

Sugar commission, International. Spring session, 1907. Report of proceedings. *Foreign office.* (cd. 3607.) 2d.

Sugar convention, despatch to H. M. minister at Brussels respecting the international, of March 5, 1902. *Foreign office.* (cd. 3577.) $\frac{1}{2}$ d.

Sweden, supplementary agreement between the United Kingdom and, for the mutual surrender of fugitive criminals. Signed at London, July 2, 1907. *Foreign office.* (cd. 3647.) $\frac{1}{2}$ d.

Treaty series, general index to the, 1902-1906. *Foreign office.* (cd. 3605.) 2d.

Turkish custom duties, correspondence respecting the increase of the. 1907. *Foreign office.* (cd. 3455.) 2s.

White slave traffic, correspondence respecting the International conference on the, held at Paris, October, 1906. *Foreign office.* (cd. 3453.) 2½d.

Wounded in armies in the field, accession of Cuba, Dominican Republic, Hayti, and Paraguay to the Geneva convention, 1864, for the amelioration of the condition of the. July 6, 1907. *Foreign office.* (cd. 3608.) ½d.

Wounded and sick in armies in the field, International convention for the amelioration of the condition of the. Signed at Geneva, July 6, 1906. *Foreign office.* (cd. 3502.) 3d.

AUSTRALIA

New Hebrides. Correspondence relating to the convention with France. Melbourne, 1907. 47 p. (No. 15.)

BOLIVIA

Peru. Alegato de parte del gobierno de Bolivia en el juicio arbitral de fronteras con la república del Peru. Buenos Aires, 1906. xviii, 320 p., maps. *Legación de Bolivia.*

Peru. Colección de documentos que apoyan el alegato de Bolivia en el juicio arbitral con la república del Peru. Buenos Aires, 1906. 2v. maps. *Legación de Bolivia.*

Peru. Defensa de los derechos de Bolivia ante el gobierno Argentina en el litigio de fronteras con la república del Perú por Bautista Saavedra. Buenos Aires, 1906. 2v. *Legación de Bolivia.*

CANADA

International waterways commission, reports of the, 1906. Ottawa, 1907. viii, 293 p. *Dept. of public works.* (No. 19a-1907.)

CHILE

Argentine republic. La linea de frontera con la República Argentina entre las latitudes 27° i 31° S. por Luis Riso Patron. Santiago de Chile, 1907. 189 p., illus., maps. *Oficina de limites.*

Relaciones exteriores, culto i colonizacion, memoria del Ministerio de, presentada al Congreso Nacional en. 1906. Santiago de Chile, 1906. 200 p. *Ministerio de relaciones exteriores, culto i colonizacion.*

Relaciones exteriores, memoria del Ministerio de, presentada al Congreso nacional, 1903-1905. 1907. 199 p., maps. *Ministerio de relaciones exteriores.*

FRANCE

Affaires étrangères, Ministère des. Compte définitif des dépenses de l'exercice 1904. Melun, 1907. 98 p. *Ministère des affaires étrangères.*

Éthiopie, affaires d'. Commerce des armes à la côte des Somalis. 1906. Paris, 1907. 15 p. *Ministère des affaires étrangères.*

Maroc, affaires du. Protocoles et comptes rendus de la Conférence d'Algesiras. Pour faire suite à "Affaires du Maroc 1901-1905." Paris, 1906. ix, 296 p. *Ministère des affaires étrangères.*

GERMANY

Radiotélégraphique, documents de la conférence, internationale de Berlin, 1906. Berlin, 1906. xi, 374 p. *Departement des postes.*

HONDURAS

Contestacion del Congreso nacional al mensaje del señor Presidente de la república. 1907. 11 p.

Gran Bretaña. Convenio entre la direccion general de correos del reino unido de la Gran Bretaña é Irlanda y la direccion general de correos de la republica de Honduras para el cambio de giros postales. 1907. 18 p. *Direccion general de correos.*

Ley organica del cuerpo diplomatico Hondureño. Reglamento consular. Ley sobre recepciones y privilegios de los agentes diplomaticos acreditados cerca del gobierno de Honduras. Ley sobre misiones consulares extranjerias. 1906. 97 p. *Departamento de relaciones exteriores.*

Mensaje dirigido al Congreso nacional por el señor Presidente constitucional de la republica, General Don Manuel Bonilla. Enero de 1907. 16 p. *Presidente.*

Relaciones exteriores, memoria presentada al Congreso nacional legislativo por el Secretario de estado en el despacho de, acerca de los actos del poder ejecutivo del 31 de julio de 1905 al 31 de diciembre de 1906. 26, 15 p. *Departamento de relaciones exteriores.*

ITALY

Macedonia. Documenti diplomatici presentati al Parlamento italiano. 1906. 310 p. *Ministero degli affari esteri.* (N. xxvi, doc.)

URUGUAY

Convención sanitaria celebrada entre las repúblicas Argentina, Estados Unidos del Brasil, Paraguay y Oriental del Uruguay. Año 1904. Montevideo, 1906. 19 p.

INTER-PARLIAMENTARY UNION

Inter-parliamentary union. Official report of the fourteenth conference held in the royal gallery of the house of lords. London, July 23rd to 25th, 1906. 303, x. p.

Resolutions adopted by the Inter-parliamentary conference held in the royal gallery, House of lords, London, 1906. 7 p.

PHILIP DE WITT PHAIR.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF
INTERNATIONAL LAW

BAIRD V. WALKER.

In the Privy Council, 1892.

Law Reports (1892).

Appeal Cases 491.

On Appeal from the Supreme Court of Newfoundland.

The judgment of their Lordships was delivered by Lord Herschell:

This is an appeal from an order of the Supreme Court of Newfoundland. The respondents by their statement of claim alleged that the appellant wrongfully entered their messuage and premises, and took possession of their lobster factory and of the gear and implements therein, and kept possession of the same for a long time, and prevented the respondents from carrying on the business of catching and preserving lobsters at their factory.

By the statement of defence the appellant said that he was captain of H. M. S. *Emerald*, and the senior officer of the ships of Her Majesty the Queen employed during the current season on the Newfoundland fisheries; that to him, as such senior officer and captain, was committed by the Lords Commissioners of the Admiralty, by command of Her Majesty, the care and charge of putting in force and giving effect to an agreement embodied in a *modus vivendi* for the lobster fishing in Newfoundland during the said season, which as an act and matter of state and public policy had been by Her Majesty entered into with the Government of the Republic of France; that the said agreement provided, amongst other things, that on the coasts of Newfoundland, where the French enjoy rights of fishing conferred by the treaties, no lobster factories which were not in operation on the 1st of July, 1889, should be permitted, unless by the joint consent of the commanders of the British and French naval stations; that the said lobster factory of the plaintiffs being situate on the said part of the coasts of Newfoundland, and being one that was not in operation on the said 1st of July, 1889, and one which was without the consent aforesaid being used and worked by the plaintiffs as a lobster

factory whilst the said agreement was in force, and such use and working thereof being prohibited by the said agreement and in contravention of its terms, the defendant in performance of his duties did for the cause assigned enter into and take possession of the messuage and premises in the statement of claim mentioned, and of certain gear and implements; that such entry into and taking possession of the said messuage and premises, gear, and implements were made and done by the defendant in his public political capacity, and in exercise of the powers and authorities, and in performance of the duties committed to him, and were acts and matters of state done and performed under the provisions of the said *modus vivendi*; that the action taken by the defendant in putting in force the provisions of the said *modus vivendi* had with full knowledge of all the circumstances and events been approved and confirmed by Her Majesty as such act and matter of state and public policy, and as being in accordance with the instructions of Her Majesty's Government. The defendant submitted that the matters set forth in his answer to the statement of claim, and on which he rested his right to enter and take possession of the premises, were acts and matters of state arising out of the political relations between Her Majesty the Queen and the Government of the Republic of France; that they involved the construction of treaties and of the said *modus vivendi* and other acts of state, and were matters which could not be inquired into by the court.

The plaintiffs objected that the defence did not set forth any answer or ground of defence to the action, and it was ordered by the court that the points of law should be first disposed of. The Supreme Court of Newfoundland, after hearing argument, held that the statement of defence disclosed no answer to the plaintiff's claim, but gave the defendant leave to amend.

In their Lordships' opinion this judgment was clearly right, unless the defendant's acts can be justified on the ground that they were done by the authority of the Crown for the purpose of enforcing obedience to a treaty or agreement entered into between Her Majesty and a foreign power. The suggestion that they can be justified as acts of state, or that the court was not competent to inquire into a matter involving the construction of treaties and other acts of state, is wholly untenable.

The learned Attorney-General, who argued the case before their Lordships on behalf of the appellant, conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the provisions of a treaty. The proposition he con-

tended for was a more limited one. The power of making treaties of peace is, as he truly said, vested by our constitution in the Crown. He urged that there must of necessity also reside in the Crown the power of compelling its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war. He further contended that if this be so, the power must equally extend to the provisions of a treaty having for its object the preservation of peace; that an agreement which was arrived at to avert a war which was imminent was akin to a treaty of peace, and subject to the same constitutional law. Whether the power contended for does exist in the case of treaties of peace, and whether if so it exists equally in the case of treaties akin to a treaty of peace, or whether in both or either of these cases interference with private rights can be authorized otherwise than by the legislature, are grave questions upon which their Lordships do not find it necessary to express an opinion. Their Lordships agree with the court below in thinking that the allegations contained in the statement of defence do not bring the case within the limits of the proposition for which alone the appellant's counsel contended.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed with costs.

C. C. BROWNE, PETITIONER FOR HABEAS CORPUS, V. THE UNITED STATES OF AMERICA, RESPONDENT.

In the Court of King's Bench (Crown Side), Province of Quebec, District of Montreal, 1906.

HIS LORDSHIP [Mr. Justice Lavergne]: This is an application for a writ of *habeas corpus* to have the warrant of committal declared illegal and set aside.

The petitioner was arrested in Montreal and brought before an extradition commissioner, F. X. Choquet, Esq.

The information upon which the warrant of arrest was issued alleges that the petitioner, being an examiner of the United States customs at the port of New York, "unlawfully conspired and agreed together, and with divers other persons unknown, to defraud and of having defrauded the United States," and that Browne was convicted of said crimes.

The commissioner's warrant of committal is for having, while being a trustee of the United States, committed a breach of trust and fraud and for having defrauded the United States, and for having participated in the crime of fraud against the United States.

It will be seen that there is quite a difference between the crime charged in the information and the crime charged in the warrant of committal.

The reason is that under the treaty conspiracy is not an extradition crime.

It was therefore necessary to find, in the evidence adduced, another crime than that of conspiracy so as to justify the surrender of the fugitive.

The question then to be decided is the following: Does the evidence adduced by the United States disclose any other offense than that of conspiracy?

Unless the prosecution can show positively that Browne was convicted of another crime than that of conspiracy he cannot be surrendered and must be liberated.

If the question were one of fact as to whether the evidence be sufficient to establish a *prima facie* case of guilt, the doubt would be against the petitioner, according to a well-established rule. But in the present case, the fugitive is not an accused person, but a convicted person.

1. Was the petitioner an agent of the United States? I am satisfied, from the evidence and authorities cited, that he was.

2. Is conspiracy to defraud a fraud by itself? Conspiracy to defraud might be a fraud against the law as all offenses against the law are, but it cannot be construed as being the offense of fraud as contemplated by the statutes and even at common law. More especially it is not the fraud with which the petitioner is specifically charged. Several persons may have entered into a combination or agreement to commit a fraud, and may be found guilty of conspiracy although the fraud was not committed.

It is manifest then that a conviction of conspiracy to defraud may be arrived at without including the conviction of fraud.

It is sufficient under our own law that the conspirators be proven to have had the intention of committing a fraud, without it being necessary that the fraud be accomplished.

Under the United States statute, besides the combination or agreement arrived at by the conspirators, it is necessary that an overt act, either innocent or criminal, to effect the object of the conspiracy be proved to complete the proof of the conspiracy.

Upon this proposition there is no disagreement.

Now, the specific charge of fraud against the petitioner is not of having committed a fraud by committing a conspiracy to defraud.

I must then come to the conclusion on this point that a conviction of conspiracy to defraud is not a *prima facie* evidence of fraud.

3. What is the fraud charged against the defendant? As I have

already stated, the warrant of committal is for having, while being a trustee and agent of the United States, defrauded the United States.

An important variance between the crime charged in the information and the crime charged in the warrant of committal does not vitiate the proceedings. As long as the charge alleges fraud, and that the evidence adduced is sufficient to establish it, it matters not whether the information and warrant of committal are exactly in the same terms or not. Technical objections of that kind are not to be considered under the treaty of extradition.

The specific fraud charged against the defendant in the information is, that the petitioner has been found guilty by the Circuit Court of the United States of America for the Southern District of New York for having, before and on the 30th day of July, 1901, at the city of New York, while an agent and officer of the United States of America, defrauded the United States of large sums of money then legally due and to become due to the United States, and which should have been paid by Abraham S. Rosenthal and Martin L. Cohn to the said United States as duty upon divers importations of dutiable goods, wares, merchandise, into the United States from foreign countries.

The petitioner has really been accused of having been found guilty of having committed a fraud rather than of being guilty of it. This is the variance which exists between the information and the warrant of committal.

It matters not, in my opinion, whether the petitioner is an accused person or a convicted person. If *prima facie* evidence of the offense having been committed is produced, it is sufficient to warrant the surrender of the fugitive either as an accused person or as a convicted one.

4. What is the evidence offered by the United States to establish the accusation of fraud or the conviction of fraud?

First. An indictment laid before the Circuit Court in New York for conspiracy to defraud.

Second. A verdict of guilty rendered on that indictment.

Third. A sentence, condemning the accused as having been found guilty of conspiracy to defraud, to two years' imprisonment at Sing Sing, and to pay a fine of \$10,000.

There were also other documents and certificates produced which it is not important to mention. Objection has been made to the authenticity of the documents and to the regularity of the proof of the trial. I hold that these objections cannot be maintained.

There is really only one debatable question in this case, which is the

following: Is the production of the indictment, verdict, and sentence for conspiracy to defraud sufficient to establish the commission of the fraud?

The indictment, after alleging the conspiracy, alleges overt acts to effect the object of the conspiracy. These overt acts are set out in five different counts. Each of these overt acts may amount to a fraud; the three first ones are charged against Rosenthal and Cohn, and the two last are against Browne, the fugitive.

To obtain a verdict for conspiracy to defraud, it was only necessary to prove one of them; one of the overt acts committed either by Rosenthal or Cohn, coupled with the proof of the conspiracy or combination entered into by the conspirators, was sufficient to warrant a verdict even against Browne for conspiracy to defraud.

These overt acts are stated in the indictment to enable the accused to prepare themselves to meet the charge, and they are only necessary on the part of the accuser to complete the proof of conspiracy; they are not any essential part of the conspiracy, but an element of proof required to establish that the conspiracy became a living, active combination. Even an overt act, innocent in itself, would be sufficient to complete the proof of conspiracy.

Even if the two last counts, which are directed against Browne alone, had been omitted, he would have been convicted of conspiracy to defraud; that is, he could have been convicted of conspiracy to defraud, without the evidence of any fraud committed by him.

The proposition of the party demanding extradition is that a general verdict, as in this case, means that all the counts have been proven, whilst the petitioner sustains the contradictory proposition. It remains a question of law and practice.

On this point we have the evidence of experts on both sides. Mr. Kalish, the expert of the petitioner, contends that when a party is tried for conspiracy under section 5440 of the Revised Statutes of the United States and convicted he is tried for and convicted of the conspiracy alone; the conviction is for the conspiracy and not for the overt acts.

The evidence of Messrs. Smith and Lloyd is to the effect that the verdict means that all the overt acts mentioned in the five counts have been proven.

The proposition sustained by Mr. Kalish is much more rational and logical; it is well complemented by his arguments and supported by several decisions of the United States Supreme Court, which is the tribunal of highest and final jurisdiction in that country. On the other hand, the authorities and precedents cited by Messrs. Smith and Lloyd

are not to the point. None of the cases cited are analogous to the present one.

Mr. Kalish enunciated the proposition that if there was an attempt to try the accused upon the overt acts charged in the indictment for conspiracy in the same trial it would be a nullification of the Constitution of the United States, which guarantees to every person charged with a crime the right to be informed of the nature and cause of the accusation.

The overt act is not the accusation — is not the charge — but the conspiracy alone is the accusation.

This proposition is also supported by precedents.

The accused, even if convicted of conspiracy under section 5440, could not plead *autrefois convict* on a subsequent indictment charging the commission of the overt act.

The United States very possibly could have brought here the witnesses heard before the Circuit Court of New York or any other witnesses cognizant of frauds committed by the fugitive, but they did not choose to do so. They have rested upon their insufficient and illegal evidence.

I have come to the conclusion that there is no legal *prima facie* evidence of the petitioner having committed any fraud for which he could be surrendered.

I may add that my conclusion and the petitioner's proposition is strengthened by the fact that the said petitioner was sentenced for conspiracy alone, and that the sentence is the one provided by the United States statute for conspiracy alone, and that a sentence for fraud would have been a different one.

In consequence, the warrant of committal is quashed, and declared null and void, the petition granted and the petitioner liberated.

ADDISON JOHNSON, AGENT AND WARDEN OF THE STATE PRISON OF THE
STATE OF NEW YORK AT SING SING, N. Y., APPELLANT, V. CHARLES C.
BROWNE.

In the Supreme Court of the United States, 1906.

205 U. S. 309.

*Appeal from the Circuit Court of the United States for the Southern
District of New York.*

The respondent sued out a writ of *habeas corpus* from the Circuit Court of the United States for the Southern District of New York, directed to the agent and warden of the State Prison at Sing Sing, in the State of

New York, where he was confined, and pursuant to the terms of the writ the respondent was brought before that court in New York City, and after a hearing the court ordered his discharge. The agent and warden has appealed to this court from that order.

The facts appearing on the hearing before the Circuit Court on the return to the writ were these:

The respondent was an examiner of silks in the appraisers' department in the port of New York, and in the spring of 1903, in the Circuit Court of the United States for the Southern District of New York, a grand jury found two indictments against him, one being found against him jointly with two others for conspiring to defraud the United States in violation of section 5440 of the Revised Statutes; and the other was against him alone for knowingly attempting to enter certain Japanese silks upon payment of less than the amount of legal duty thereon, in violation of section 5444, Revised Statutes.

In January, 1904, he, in company with one of the others named in the indictment (the other having fled the jurisdiction), was tried in the Circuit Court of the United States for the Southern District of New York upon the indictment charging them with conspiracy. He was convicted and sentenced to imprisonment in the State Prison at Sing Sing, N. Y., for two years.

He appealed to the Circuit Court of Appeals for the Second Circuit, where the conviction was affirmed, and thereafter an application was made in his behalf to this court for a *certiorari* to review the judgment of conviction, which application was denied in January, 1906.

After his trial and conviction, and pending a review of the judgment, the respondent had been enlarged on bail, and after the judgment was affirmed in the Circuit Court of Appeals and a *certiorari* from this court had been denied, he was, on the 19th of January, 1906, duly called in the Circuit Court to submit himself to sentence, but did not appear, and his default was entered.

A few days subsequently he was found in the Dominion of Canada. This Government then instituted extradition proceedings in Montreal to procure his rendition upon the judgment of conviction of conspiracy to defraud the United States, and claimed it was an extraditable crime under the fourth subdivision of Article I of the treaty or "extradition convention" of 1889, between the United States and Great Britain. That subdivision reads as follows:

4. Fraud by a bailee, banker, agent, factor, trustee or director or member or officer of any company made criminal by the laws of both countries.

The respondent was held for extradition by the Canadian commissioner, but, on writ of *habeas corpus*, the Court of King's Bench held that the conspiracy to defraud the United States, as set forth in the indictment upon which respondent was convicted, was not such a fraud as was provided for in the subdivision of the article of the treaty above referred to. Extradition was therefore refused.

Thereupon the United States secured the rearrest of the respondent on another complaint, charging him with the offenses for which he had been indicted under section 5444 of the Revised Statutes, and for which he had not been tried in New York. The Canadian commissioner held the respondent upon that complaint, and ordered his extradition, and, upon a writ of *habeas corpus*, the Court of King's Bench affirmed that order; and the respondent was then surrendered to the proper agent of the United States, who at once took him to the State of New York, and, having arrived within the Southern District of that State, the marshal of that district, proceeding under the warrant for imprisonment issued by the Circuit Court upon the conviction of the respondent on the conspiracy indictment, took possession of him and delivered him into the custody of the warden of Sing Sing Prison, there to be imprisoned for two years, according to the sentence imposed upon him under the conviction as stated.

The respondent then obtained this writ upon a petition setting forth the above facts, and claimed that his imprisonment was in violation of the third and seventh articles of the extradition treaty between the United States and Great Britain. (26 Stat. 1508.) The warden of the prison made return August 7, 1906, that he held the respondent by virtue of the final judgment of the Circuit Court of the United States for the Southern District of New York, rendered on the 9th of March, 1904, as above set forth.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the court.

It does not appear that any movement has been made or notice given by this Government to try the respondent on the indictment for the crime for which he has been extradited, but his imprisonment in Sing Sing Prison is upon a conviction of a crime for which the Canadian court had refused to extradite him, and is entirely different from the one for which he was extradited. In other words, he has been extradited for one offense and is now imprisoned for another, which the Canadian court held was not, within the treaty, an extraditable offense.

Whether the crime came within the provision of the treaty was a matter for the decision of the Dominion authorities, and such decision was final by the express terms of the treaty itself. (Article 2, Convention of July 12, 1889, 26 Stat. 1508; United States Treaties in Force April 28, 1904, pages 350, 351.)

We can readily conceive that if the Dominion authorities, after the Court of King's Bench had decided that the crime of which respondent had been convicted and for which extradition had been asked was not extraditable, and the request for extradition had, therefore, been refused, had been informed on the subsequent proceeding for extradition on the other indictment that it was not the intention of this Government to try respondent on that indictment, but that having secured his extradition on that charge it was the intention of this Government to imprison him on the judgment of conviction they would have said that such imprisonment would not be according to the terms of the treaty, and they would have refused to direct his extradition for the purpose stated.

Although the surrender has been made, it is still our duty to determine the legality of the succeeding imprisonment, which depends upon the treaty between this Government and Great Britain, known as the Ashburton Treaty of 1842, (8 Stat. 572-6, Art. 10,) and the subsequent one, called a convention, concluded in 1889, and above referred to.

The treaty of 1842 had no express limitation of the right of the demanding country to try a person only for the crime for which he was extradited, and yet this court held that there was such a limitation, and that it was to be found in the "manifest scope and object of the treaty itself;" that there is "no reason to doubt that the fair purpose of the treaty is, that the person shall be delivered up to be tried for that offense and for no other." (United States v. Rauscher, 119 U. S. 407, 422, 423.)

Again, at the time of the decision of the Rauscher case there were in existence sections 5272 and 5275 R. S. (3 Comp. Stat. p. 3595), both of which are cited and commented upon in that case, and in the course of the opinion of Mr. Justice Miller, at page 423, he said:

The obvious meaning of these two statutes, which have reference to all treaties of extradition made by the United States, is that the party shall not be delivered up by this Government to be tried for any other offense than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, he shall not be arrested or tried for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought. This is undoubtedly a Congressional construction of the purpose and meaning of extradition treaties, such as the one we have under consideration,

and whether it is or not, it is conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings.

That right, as we understand it, is that he shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition.

Mr. Justice Gray, page 433, in his concurring opinion, places that concurrence upon the single ground that these sections clearly manifest the will of the political department of the Government in the form of an express law that the person should be tried only for the crime charged in the warrant of extradition, and he should be allowed a reasonable time to depart out of the United States before he could be arrested or detained for any other offense. Both grounds were concurred in by a majority of the whole court.

If the question now before us had arisen under the treaty of 1842 and the sections of the Revised Statutes above mentioned, we think the proper construction of the treaty and the sections would have applied to the facts of this case and rendered the imprisonment of the respondent illegal. The manifest scope and object of the treaty itself, even without those sections of the Revised Statutes, would limit the imprisonment as well as the trial to the crime for which extradition had been demanded and granted.

It is true that the tenth article of the treaty contained no specific provision for delivering up a convicted criminal, but if otherwise delivered he could not have been punished upon a former conviction for another and different offense.

The claim is now made on the part of the Government that "the manifest scope and object of the treaty" of 1842 are altered and enlarged by the treaty or convention of July 12, 1889. The second, third, sixth, and seventh articles of that convention are set forth in the margin.*

* Article II.

A fugitive criminal shall not be surrendered, if the offense in respect of which his surrender is demanded be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character.

No person surrendered by either of the high contracting parties to the other shall be triable or tried, or be punished for any political crime or offense, or for any act connected therewith, committed previously to his extradition.

It will be perceived that the second article provides that no person surrendered shall be triable or tried, *or be punished*, for any political crime or offense, while article three provides that no person surrendered shall be triable or be tried (leaving out the words "or be punished") for any crime or offense committed prior to the extradition, other than the offense for which he was surrendered, until he shall have had an opportunity for returning to the country from which he was surrendered. Hence it is urged that, as punishment for another offense of which the person had been convicted is not in so many words expressly prohibited in and by article three, a requisition may be obtained for one crime under that article, and when possession of the person is thus obtained he may be punished for another and totally different crime of which he had been convicted before extradition.

We do not concur in this view. Although if the words "or be punished" were contained in the third article the question in this case could not, of course, arise, yet we are satisfied that the whole treaty, taken in

If any question shall arise as to whether a case comes within the provisions of this article, the decision of the authorities of the government in whose jurisdiction the fugitive shall be at the time shall be final.

Article III.

No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.

Article VI.

The extradition of fugitives under the provisions of this convention and of the said tenth article shall be carried out in the United States and in Her Majesty's dominions, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering State.

Article VII.

The provisions of the said tenth article and of this convention shall apply to persons convicted of crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

In case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction and of the sentence of the court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers.

connection with that of 1842, fairly construed does not permit of the imprisonment of an extradited person under the facts in this case.

The mere failure to use these words in the third article does not so far change and alter "the manifest scope and object" of the two treaties as to render this imprisonment legal. The general scope of the two treaties makes manifest an intention to prevent a state from obtaining jurisdiction of an individual whose extradition is sought on one ground and for one expressed purpose, and then having obtained possession of his person to use it for another and different purpose. Why the words were left out in the third article of the convention of 1889, when their insertion would have placed the subject entirely at rest, may perhaps be a matter of some possible surprise, yet their absence cannot so far alter the otherwise plain meaning of the two treaties as to give them a totally different construction.

In addition to the provisions of the treaty of 1889 we find still in existence the already-mentioned sections of the Revised Statutes, which prohibit a person's arrest or trial for any other offense than that with which he was charged in the extradition proceedings, until he shall have had a reasonable time to return unmolested from the country to which he was brought.

It is argued, however, that the sections in question have been repealed by implication by the treaty or convention of 1889, and that the respondent, therefore, cannot obtain any benefit from them. We see no fair or reasonable ground upon which to base the claim of repeal. Repeals by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication, unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty. (*United States v. Lee Yen Tai*, 185 U. S. 213.) If both can exist the repeal by implication will not be adjudged. These sections are not incompatible with the treaty or in any way inconsistent therewith. We find nothing in the treaty which provides that a person shall be surrendered for one offense and then that he may be punished for another, such as is the case here. The most that can be asserted is that an inference to that effect perhaps might be drawn from the absence in article 3 of positive language preventing such punishment. But that slight and doubtful inference, resting on such an insufficient foundation, is inadequate to overcome the positive provisions of the statute and the otherwise general scope of both treaties, which are inconsistent with the existence of such right.

It is urged that the construction contended for by the respondent is

exceedingly technical and tends to the escape of criminals on refined subtleties of statutory construction, and should not, therefore, be adopted. While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought by doubtful construction of some of its provisions to obtain the extradition of a person for one offense and then punish him for another and different offense. Especially should this be the case where the government surrendering the person has refused to make the surrender for the other offense on the ground that such offense was not one covered by the treaty.

Our attention has been directed to various other treaties between this Government and other nations, where provision is expressly made in regard to punishment. They frequently provide that no person shall be triable or tried "or be punished" for any other offense than that for which he was delivered up until he has had an opportunity of returning to the country from which he was surrendered. But because in some of the treaties the words "or be punished" are contained we are not required to hold that in the case before us the absence of those words permits such punishment, when that construction is, as we have said, contrary to the manifest meaning of the whole treaty, and also violates the statutes above cited. The order of the Circuit Court is affirmed.

Mr. Justice MOODY did not sit in the case and took no part in its decision.

IN THE MATTER OF THE PROBATE OF THE WILL OF YOUNG JOHN ALLEN.

United States Court for China, Term at Shanghai.

August, 1907.

SYLLABUS.

Domicil under American law is that place which a person has freely chosen for his abode, and from which he has no present intention of removing.

Extraterritoriality is that act by which a state, usually by virtue of a treaty, extends its jurisdiction beyond its own boundaries into the territory of another state and exercises the same over its nationals who, for the time being, may be sojourning within the territory of the other state.

There is nothing in the theory or practical operation of the law of extraterritoriality repugnant to or irreconcilable with the application of the American law of domicile by American Courts to American citizens residing in a country with which the United States has treaties of extraterritoriality.

Dr. Young J. Allen, having resided in Shanghai for a period of forty-seven years prior to his death, and having expressed the intention of making Shanghai his permanent home, thereby acquired an extraterritorial domicile in China. The Court in administering his estate will be guided by the common law which is in force in China, the place of his domicile at the date of his death, and not by the statutes of Georgia, the place of his domicile of origin.

OPINION.

I.

In view of the well established principle of law that the personal property of a deceased person must be administered according to the law of his domicile, it becomes necessary at the outset to determine where the testator in the will here presented for probate was domiciled at the date of his death.

The facts in this case are as follows: Dr. Young J. Allen was born in the year 1836 in the State of Georgia. In 1860 he moved to China, where he lived continuously for a period of forty-seven years. He died in Shanghai on May 30, 1907. China was the chosen field of his activities, and the instruction of its people in the principles of Christian civilization was his life work. Here his family was reared and now lives. Here his estate, consisting solely of personal property, was accumulated, and it was his oft expressed intention to make China his permanent home. The will which his legal representatives now present for probate is wholly in his own handwriting, and was duly attested by two witnesses. Neither of these witnesses, however, is within the jurisdiction of the Court. This being the case, the instrument before the Court must be regarded as a holographic will, which, under the common law now in force in China, is valid, but the Court is not informed that such a will is recognized by the law of Georgia.

These facts present for consideration one of the most complex and important subjects connected with the operation of the law of extraterritoriality. Succinctly stated, the legal question here involved is: Can an American citizen acquire what may be termed an extraterritorial

domicil in China? Can he have a domicil out of the United States in which he is nevertheless governed by the laws of the United States, or must he retain that of the state where he was domiciled before settling in China? In investigating this subject, it will be necessary to have a clear conception, first, of the American law of domicil, and second, of the true meaning of extraterritoriality.

II.

That a person must always have a domicil somewhere, that no person may have more than one domicil at a time, that every natural person free and *sui juris* may change his domicil at pleasure, and that civil status, with its attendant rights and disabilities, depends, not upon nationality but upon domicil, are propositions upon which the authorities are universally agreed. While domicil has been defined by law writers in a variety of ways, yet there are two elements which are found in all definitions, namely, residence and *animus manendi*, or intention of continued residence. In recent years, however, there has been a tendency on the part of the courts to modify this definition by substituting for the *animus manendi*, or intention of residing permanently in a certain place, the absence of the *animus revertendi*, or the intention of returning to the place of former residence.

Vattel defines domicil as "an habitation fixed in some place with the intention of remaining there always." Savigny says, "That place is to be regarded as a man's domicil which he has freely chosen as his permanent abode (and thus for the center at once of his legal relations and his business)." According to Judge Story, "That place is properly the domicil of a person in which his habitation is fixed without any present intention of removing therefrom." Phillimore defines it as "Residence at a particular place accompanied with (positive or presumptive proof of) an intention to remain there for an unlimited time." The definition of Vice-Chancellor Kindersley, while lacking in precision, is perhaps more comprehensive than any of the foregoing. It is as follows: "That place is properly the domicil of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home." (Dicey, Conflict of Laws, American Notes by Moore, p. 728.)

Mr. Webster, while Secretary of State, had occasion to consider the law of domicil, and expressed his views on the subject as follows:

The general rule of the public law is, that every person of full age has a right to change his domicile; and it follows, that when he removes to another place, with an intention to make that place his permanent residence, or his residence for an indefinite period, it becomes instantly his place of domicile; and this is so, notwithstanding he may entertain a floating intention of returning to his original residence or citizenship at some future period. . . . In questions on this subject, the chief point to be considered is the *animus manendi*, or intention of continued residence; and this must be decided by reasonable rules and the general principles of evidence. If it sufficiently appear that the intention of removing was to make a permanent settlement, or a settlement for an indefinite time, the right of domicile is acquired by a residence even of a few days. (Thrasher's Case, Moore, International Law Digest, vol. 3, p. 818.)

The feature here prominently brought out, that domicile will not be defeated by a mere "floating intention" to remove from the locality at some future date, has been adopted by American courts in recent years. (Gilman v. Gilman, 52 Maine 165, 83 Am. Dec. 502.)

In view of the foregoing we feel warranted in stating that under American law a person's domicile is that place which he has freely chosen for his abode and from which he has no present intention of removing.

III.

It now becomes necessary to ascertain if there be any reason why the foregoing principles may not be applied to American citizens residing in a country with which the United States has a treaty of extraterritoriality. This leads to an investigation of the real meaning of extraterritoriality. It is well-nigh impossible to give an exact definition of the term, yet its practical application is not difficult of comprehension. Broadly speaking, extraterritoriality is a term used to describe the act by which a state extends its jurisdiction beyond its own boundaries into the territory of another state, and exercises the same over its nationals who, for the time being, may be sojourning in the territory of the other state. It is usually based upon treaty, but the rights and privileges arising therefrom are frequently amplified by usage and sufferance. Extraterritoriality is put in operation mainly by western states in oriental countries where it signifies principally the exemption of the nationals of said western states from local jurisdiction, and a corresponding exercise of jurisdiction over them by their own national authorities.

For the purpose of ascertaining the practical operation of the law of extraterritoriality, we shall now trace in brief outline the history of its application in China by two prominent western nations, the United States and Great Britain, under their treaties of extraterritoriality with

that country. It will be observed that the treaties under which these two nations operate in China are substantially the same. Great Britain, however, has exercised its rights and privileges under the treaties and developed its law of extraterritoriality in China to a far greater extent than has the Government of the United States.

The first treaty of extraterritoriality between the United States and China was entered into on July 3, 1844, and a second treaty was concluded on June 18, 1858. Articles XXV and XXVII, respectively, of said treaties provide:

All questions in regard to rights, whether of property or of person, arising between citizens of the United States in China, shall be subject to the jurisdiction and regulated by the authorities of their own Government.

Congress in 1848 and in 1860 enacted statutes for the purpose of carrying into full force and effect the provisions of these treaties, and to that end extended certain laws to China and created Consular Courts, vesting them with authority to apply and execute said laws. The body of laws which Congress has extended to Americans in China consists of those statutes of the United States suitable to carry the treaties into effect, the common law, including the law of equity and admiralty, and certain regulations of the American Minister to China promulgated to supply the deficiencies in these laws. (U. S. Revised Statutes, Sec. 4086.)

On June 30, 1906, Congress passed the Act creating this Court and vested it substantially with the jurisdiction formerly exercised by the Consular Courts. (For a complete statement of the history of the American law of extraterritoriality in China, see Hinckley, *American Consular Jurisdiction in the Orient*.)

Great Britain, on the other hand, by successive Foreign Jurisdiction Acts from 1843 to 1890, by numerous Orders in Council, by Regulations promulgated by the British Minister at Peking, and by the decisions of the British Supreme Court at Shanghai, has amply provided for the protection and government of its subjects in China, and has probably carried the law of extraterritoriality in China to a higher degree of development than any other foreign power. The extent to which Great Britain has exercised its power under the treaties will appear from an examination of what is known as the Foreign Jurisdiction Act of 1890, and an examination of the jurisdiction possessed by the British Supreme Court of Shanghai. Section 1 of the Foreign Jurisdiction Act provides:

It is and shall be lawful for Her Majesty the Queen to hold, exercise and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.

Section 3 of the Act provides:

Any act or thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be as valid as if it had been done according to the local law then in force in that country.

And Paragraph 2 of Section 5 provides:

Thereupon those enactments (described in the first schedule of this Act) shall, to the extent of that jurisdiction, operate as if that country were a British possession and as if Her Majesty in Council were the Legislature of that possession. (53 and 54 Victoria, Chapter 37.)

The British Supreme Court in Shanghai, which was established in 1866, is vested with jurisdiction to execute the laws which Great Britain has extended to its subjects in China. This Court is in fact a British Court, and in addition to ordinary civil jurisdiction, exercises jurisdiction in cases involving admiralty, bankruptcy and lunacy, and in addition to the ordinary criminal jurisdiction, it exercises jurisdiction in some special statutory offences such as offences against the Patents and Trade-marks Acts. (Piggott, *Exterritoriality*, p. 40.) To such an extent has the British jurisdiction in China been developed that there is almost no legislative or judicial phase of the law in force in England which, if necessary in China, has not its counterpart here. On the other hand, "common law" and "equity" form the vague and indefinite description of the main law in force in respect to Americans in China.

From the foregoing it will be seen that while the Emperor of China exercises nominal sovereignty over all Chinese territory including that occupied by the nationals of the United States and Great Britain, yet the jurisdiction of these two countries over their own citizens who reside in China is, for all practical purposes, as full and complete as if China were in fact territory belonging to these nations.

IV.

We come now to the consideration of the main question in this case, namely, whether there be anything in the practical operation of the law of extraterritoriality fatal to the application of the principles of the American law of domicile to Americans residing in China. So far as we

are able to ascertain, this question has not been passed upon by the courts of the United States, nor has it been made the subject of discussion by the executive branch of the Government. It has, however, received the careful consideration of the courts of last resort of Great Britain with the unlooked for result that there is now no such thing known to the British law of extraterritoriality as an Anglo-Chinese domicile.

The leading case on this subject originated in Shanghai, and is known as "Tootal's Trusts." The facts in this case were as follows: After some previous changes of residence, Tootal, a subject of Great Britain, in 1862 came to reside in Shanghai, and with the exception of some short visits to England for health and business, he continued to reside at Shanghai until 1878, the date of his death. It was admitted that some years before his death he had determined to reside permanently at Shanghai, had relinquished all intention of ever returning to England and had expressed this intention on a number of occasions. In his will he described himself as a resident of Shanghai in the Empire of China. The decision of the Court was written by Mr. Justice Chitty, who held that British subjects in eastern countries in all cases retain their domicile in that portion of the British Empire in which they were domiciled previously to taking up their abode in an eastern state. The decision is based on the proposition that residence in a "territory" is an essential part of the legal idea of domicile, and holds that "there is no authority that an individual can become domiciled as a member of a community which is not a community possessing the supreme or sovereign territorial power." (*Re Tootal's Trusts*, L. R. 23 C. D. p. 532.)

The doctrine thus laid down was followed by the Court in the case of *Abd-ul-Messih v. Farra* (13 App. Cases 431). The decision in this case was written by Lord Watson. "Their Lordships," he says, "are satisfied that there is neither principle nor authority for holding that there is such a thing as domicile arising from society and not from connexion with a locality. In *re Tootal's Trust* is an authority strictly in point, and their Lordships entirely concur in the reasons by which Mr. Justice Chitty supported his decision in that case." (See also *Maltass v. Maltass*, 1 Rob. Ecc. 80 and *The Indian Chief*, 3 Rob. Adm. 29.)

While these decisions fix the law of Great Britain on this subject for the present, the doctrine here laid down has not commended itself to the judgment of the leading British commentators on the subject of extraterritoriality. Sir Francis Piggott, Chief Justice of Hongkong, in a work which has just come from the press, expresses the opinion "that when the question is again raised it will be found that the principles

established by the most recent cases necessitate a reconsideration of the law laid down on the subject by Mr. Justice Chitty." The learned Justice then enters upon an exhaustive examination of the principle upon which the foregoing decisions are based, and discusses the same in the following manner:

At the time when many of the definitions were framed, the law applicable to extritoriality was little known, and in some cases was not present in the mind of the Judges who framed them. Locality and territory were obviously the terms which would be used; the community among which a person settled being as obviously identified with the locality. But it attached undue importance to the word to insist that because "locality" is used in the definitions in cases where there could be no questions as to its fitness, therefore it excluded the idea of "relationship to a community" in the first case that came up for argument, in which the point was whether "relationship to a community" is or is not involved in domicile. . . . The community referred to is of course the community which inhabits a country, or a definite locality; in other words, a community which has laws and customs of its own, which the Government of the locality imposes on all members of it; but the question is whether the reason of the rule, the whole principle on which it is based, do not render it as applicable to an extritorial community as to a territorial one. On the hypothesis the circumstances may be the same in the one as in the other. A man may set up his home in a Treaty Port, he may have banished forever the idea of returning to his native country; the *animus manendi* may be clear, without shadow of doubt; on the hypothesis, too, there is a body of law regulating the community. Why is it impossible then for the ordinary principles of the law to be applied, and for the personal relations of the permanent members of the community to come under that law permanently as the law of the domicile of their choice: of those who are born members of the community as the law of the domicile of their origin? . . . Linking these two propositions together, it is suggested that the inevitable result is a modification of Lord Watson's interpretation of the law of domicile referred to above on the following lines:—The law which regulates a man's personal status must be that of the governing Power in whose dominions his intention is permanently to reside, or must be so recognized and established by that governing Power as to be in fact the law of the land. (Piggott, *Exterritoriality*, pp. 228, 230, 232-233.)

The subject has also been carefully gone into by Hall, the celebrated authority on International Law, in his work on "The Foreign Jurisdiction of the British Crown." He also takes issue with the Court in the *Tootal's Trusts* case, and expresses his views on the subject as follows:

It is perhaps to be regretted that a change in the law is not made which a short Order in Council could easily effect. Anglo-Oriental domicile has its reasonable, it may almost be said, its natural place. Conflicts between the differing laws of England, of Scotland, of the various self-governing colonies, are inevitable within British jurisdiction in the East; but it is unnecessary to

multiply the points of collision. So long as persons have not identified themselves with the life of a new community, they must keep each his own law; but as soon as they have shown their wish and intention to cut themselves adrift from the association of birth, they prove their indifference to the personal law attendant on their domicile of origin; there is, therefore, no reason why simplicity and unity of law should not be gained for British subjects by attributing community in the laws of England to all of European blood. There is also every reason for avoiding very grave difficulties of another kind, which are opened through invariable preservation of the domicile of origin. English families, even in the present day, often remain through more than one generation in Oriental countries as their permanent place of abode; formerly the history of persons whose domicile might become a matter of importance was generally known sufficiently well; many are now of obscure antecedents and of an origin uncertain among the numerous places from which British subjects can derive. As no domicile can be acquired in an Anglo-Oriental community, it becomes every year more probable that cases will occur in which the determination of the domicile of a father, perhaps of a grandfather, may become necessary, and in which it may be equally impracticable to impute an English domicile or to attribute any other with fair probability. It would be a great advantage that in such cases there should be a fixed rule which should correspond with the obvious facts, and that the courts, instead of searching with infinite trouble and expense for an ancestral domicile should be enabled to find that a domicile had been acquired in the Eastern country which carried with it the application of English law; — that, in other words, residence in China under English law, with the *animus manendi*, should imply domicile in China under the condition of the applicability of the special law of the English community established there, as that law is defined by Order in Council. Theoretically the conception of such a domicile is unobjectionable if once the mind is cleared of the notion, at present dominant, that domicile is the creature of place and intention alone. In Europe it is so, because residence in a place implies subjection to the common territorial law, and to no other; in the East it is not necessarily so, because residence there implies subjection to the law of one or other of several different communities, the personal laws of which receive equal recognition from the territorial sovereign power. Association with place is necessary to domicile; but it is not always the sole determinant factor. In any case, even if the conception of domicile here suggested be anomalous, the convenience of giving effect to it is large enough to excuse a certain sacrifice of logical principle. (Hall, *Foreign Jurisdiction of the British Crown*, pp. 184–186.)

After a careful consideration of the principles of law on this subject as well as the practical demands of the situation, this Court is inclined to give greater weight to the foregoing argument of Mr. Hall than to the line of reasoning adopted by Mr. Justice Chitty in the *Tootal's Trusts* case. We can see no good reason for holding that a citizen of the United States cannot be domiciled in China. Mr. Justice Chitty's decision destroys in their application to China all the definitions of domicile con-

tained in the books. It ignores both of the essential elements of residence and intention. The British Courts were correct when they stated that there was no authority for holding that an individual could not become domiciled as a member of a community which was not a community possessing the supreme or sovereign territorial power. This fact, however, is without significance when it is noted that the courts were considering the first case of this character which had ever been presented for judicial determination. At the time the Tootal's Trusts case came up for consideration, the British law of extraterritoriality was not so well developed as it is now, and the subsequent trend of events has given it a different meaning from what it had at the time the decision was rendered. It was quite natural for the courts thirty years ago to announce that the immiscible character of the two races and the radical difference between the religions, customs, habits and laws of peoples of the two countries raised a strong presumption against a British subject becoming domiciled in China. At that time it was doubtless the fixed purpose of the majority of those who came to China to sojourn here only a few years and then to return to the country from which they came. This is not the case at present. Many families dwell here now with the fixed purpose of making China their permanent home. There are abundant examples of families permanently located here, and this is likely to become more common in the future. In view of this fact, the number of heirs and distributees of foreign citizens decedent in China who live in China in proportion to those who dwell in the countries from which said foreigners came, is rapidly growing larger, thus necessitating the adoption of a rule which will meet the practical demands of the situation.

From the standpoint of expediency, Hall has very clearly pointed out that conflicts between the laws of England, Scotland and various self-governing colonies are inevitable within British jurisdiction in the East. This proposition is too clear to require the support of argument. If this Court should adopt the rule laid down by the British Courts, such conflicts would be perhaps more numerous and more pronounced in the administration of American law in China than in administration here of the law of Great Britain. The adoption of such a rule would put this Court to the necessity in the matter of probating wills of applying the laws of forty-six different commonwealths, to say nothing of the laws of our territories and insular possessions. This would be practically impossible. Furthermore, the adoption of the British rule would require this Court not only to hold that Dr. Allen, who had resided in China for forty-seven years and who had expressed his intention of residing here

permanently, was domiciled in Georgia, but also to hold that his children and grand-children, some of whom have never been in Georgia, and who never expect to reside there, are nevertheless domiciled in that State. This proposition is too extravagant to be maintained. It requires a greater stretch of the imagination and the adoption of a greater fiction of law to hold that a person can be domiciled in a country where he does not reside and has no intention of residing at any future time than to hold that a citizen of a foreign State can acquire an extraterritorial domicile in a community which is not the community possessing the sovereign territorial power. Every consideration of reason and convenience demands that the American law of domicile be applied by American Courts in China.

We hold therefore:

First:— That there is nothing in the theory or practical operation of the law of extraterritoriality inconsistent with or repugnant to the application of the American law of domicile to American citizens residing in countries with which the United States has treaties of extraterritoriality.

Second:— That Dr. Young J. Allen, having lived in China for a period of forty-seven years and having expressed his intention to live here permanently, thereby acquired an extraterritorial domicile in China; consequently this Court in the administration of his estate will be guided by the law which Congress has extended to Americans in China, which is the common law.

Signed: L. R. WILFLEY,
Judge of the United States Court for China.

SHANGHAI, August 16, 1907.

VON THODOROVICH V. FRANZ JOSEF BENEFICIAL ASSOCIATION.

In the Circuit Court of the Eastern District of Pennsylvania.

154 Federal Reporter, 916.

ARCHBALD, District Judge: This is a bill brought by the imperial and royal consul of Austria-Hungary, located at Philadelphia, to restrain the defendant company, its officers and agents, from making use of the name or portrait of the Emperor Franz Josef, or from representing or doing anything to induce the belief that the business conducted by the company has any official or other relation with such Emperor. The company was incorporated in 1887 by the court of common pleas No. 2, of Philadelphia, as a beneficial association, under the general corporation

act of the State of Pennsylvania of April 29, 1874 (P. L. 73), which, among other things, allows (section 2) the formation of corporations for "the maintenance of a society for beneficial or protective purposes to its members, from funds collected therein;" and it was subsequently merged with the Panonia Beneficial Association, thereafter apparently losing its identity and ceasing to exist as a separate organization. Within the last year, however, in some way which is not disclosed, the individual defendants, who are its officers, have got hold of the charter and are carrying on a life insurance business under it, soliciting the patronage of persons of German, Hungarian, Polish, and Slavish birth, who have emigrated to the United States from Austria-Hungary, and are subjects of the Emperor Franz Josef; it being represented to them, in that connection, that the association is under his special patronage and has his imperial sanction and concern, of which the use of his name to designate the association, and the adoption of his portrait as a part of the corporate seal, is a direct assurance, according to the customs of the country from which they come. National feeling and loyalty to the Emperor are thus played upon to further the business of the association, the deceptive and fraudulent character of which, as it is claimed, is evidenced not only by these misstatements, but by others as to its original organization, age, and present financial standing, in line with which the imposing building of the Liverpool, London and Globe Insurance Company, on Walnut street, Philadelphia, where the defendants occupy two small and scantily furnished rooms, is pictured and palmed off as the home office of the association. Feeling that his countrymen are being deceived and cheated and are in need of his assistance and protection, the present bill has been filed, and an injunction is sought by the consul to put an end to these practices.

The right of the consul to intervene in this way is challenged upon several grounds. The whole basis of the bill, as it is said, is the use of the Emperor's name, which, except sentimentally, is no concern of the consul; the breach of privacy involved, if any, being a personal matter, which the Emperor himself must go about to redress, and not the consul. And against this, moreover, as it is claimed, equity will not relieve even as to an ordinary individual (*Robertson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442, 89 Ann. St. Rep. 828, 59 L. R. A. 478; *Atkinson v. Doherty & Co.*, 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. Rep. 507), much less one standing in the public eye like the Emperor. *Corliss v. Walker Co.*, 57 Fed. 434, 64 Fed. 280, 31 L. R. A. 283. But without assenting to all that is so said, it is correct to the

extent that, if the use of the Emperor's name, in connection with the defendant association, is offensive to the Emperor or his subjects, it is not for the consul to remedy it. *The Anne*, 3 Wheat. (U. S.) 435, 4 L. Ed. 428. But that is not material, not being the basis of the present bill. The consul, in other words, does not come into court in the name or on behalf of the Emperor. He is here professedly and distinctly to prevent the misleading and defrauding of his countrymen, and for this he has express sanction. By treaty between the United States and the Emperor of Austria ratified June 27, 1871, it was, among other things, provided that —

Consuls general, consuls, vice-consuls, or consular agents, of the two countries, may in the exercise of their duties, apply to the authorities within their district, whether federal or local, judicial or executive, * * * for the purpose of protecting the rights of their countrymen.

The present suit, therefore, if sustained by the facts, is entirely justified. And as bearing upon this, it may be noted in passing that this court some two years ago entertained a somewhat similar bill under this treaty provision.

That the parties who are in control of the defendant association are making deceptive use of the Emperor Franz Josef's name and portrait, for the purpose of inducing people of Austria-Hungarian nationality to deal with them, is clearly shown by the affidavits, and is not denied. Not only is national sentiment thus appealed to in exploiting the business, which, within proper limits, may not be reprehensible, but direct representation is made that the association is under the particular patronage of the Emperor, which is known to be untrue, but to which, according to what is testified, the use of his name and portrait gives credence among these people; neither being admissible by the laws of the country from which they come, except by express imperial consent. This of itself is suggestive of dishonest purposes, but might not, standing alone, be sufficient to lay hold of, if a legitimate and responsible business was being conducted. But this is not the fact. As a beneficial association, to say no more, the defendants have no right to go into life insurance, which is altogether different. *Commonwealth v. National Mutual Aid Association*, 94 Pa. 481; *Commonwealth v. Equitable Beneficial Association*, 137 Pa. 412, 18 Atl. 1112. And while the insurance department of the State may be relied upon to remedy this, when once its attention has been called to it, in the meantime ignorant immigrants are liable to be deceived into investing their money upon expectations, which have little

chance, if indeed they ever were intended to be realized. Ignorant of the laws and customs of the land, and coming from a country where they are materially different, they need the assistance of some one upon whom they can rely to take measures such as this to protect them against imposition, and it is for this, among other things, that the treaty evidently provides. If arrested or imprisoned, there can be no question as to the right, as well as the duty, of the consul to intervene in their behalf; and it is but little less important that he should do so where their scanty and hard-got earnings are at stake.

It is true that the association has not failed as yet to fulfil its undertakings, nor, so far as appears, has any complaint with regard to it been made; and in confining the relief sought to restraining the use of the Emperor's portrait and name, which only goes to a part of the mischief done, there may be a suspicion that the consul, after all, is more zealous in behalf of his imperial master than those whose cause he professes to espouse. But, starting out, as the association does, and making use of deceptive agencies, as those in charge of its affairs have shown themselves ready and willing to do, the fraud is so manifest that it was not necessary to wait until actual injury has been done, which would only afford very imperfect relief. And while the use of the Emperor's name is only one of the means employed, and if innocently used there would be no particular ground for complaint, yet it is by far the most important one; and perverted, as it is, and lending itself, as it unfortunately does, in the control of unscrupulous parties, to the serious deception practiced in this case, the only safety is in compelling it to be completely dropped. And if there is occasion for requiring this upon the facts shown, the sentimental motive, if any, of the plaintiff is of no particular concern. This does not prevent the defendants, as it will be noted, from continuing their business, whatever it may be, provided they do so under another name, which is easily obtained. Nor does it matter that the name which they have was given them by charter. The courts do not hesitate to restrain the use of corporate names, where they are the means of working injury. *American Clay Mfg. Co. v. American Clay Mfg. Co.*, 198 Pa. 189, 47 Atl. 936; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; *Charles S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769; *Van Houten v. Hooten Cocoa Co. (C. C.)*, 130 Fed. 600. The way out of it is to amend the name.

And now, July 12, 1907, after due hearing, it is ordered and decreed that a preliminary injunction issue, restraining, preventing, and prohibit-

ing the said Franz Josef Beneficial Association, William R. Evans, Julius Bacher, Victor Steinberg, and Samuel Steiner, their agents, representatives, and employes, from employing, using, printing, or having printed or impressed upon any letter heads, cards, certificates, or other literature or printed matter, either the name, profile, or portrait of Franz Josef, Emperor of Austria and King of Hungary, and restraining, prohibiting, and enjoining the said Franz Josef Beneficial Association and the other said defendants, their agents, representatives, and employes, from doing any and all things calculated or tending to induce the public to believe that the business conducted by the defendants or the said beneficial association, whose officers and agents they are, has any official or other relation with Franz Josef, Emperor of Austria and King of Hungary, aforesaid.

BOOK REVIEWS

International Law as Interpreted During the Russo-Japanese War. By F. E. Smith, M. A., B. C. L., and N. W. Sibley, B. A., LL. M. The Boston Book Co., U. S. A. 1905.

The International Law and Diplomacy of the Russo-Japanese War. By Amos S. Hershey, Ph. D., Professor of Political Science and International Law in Indiana University. New York: the MacMillan Co. London: MacMillan & Co., Ltd. 1906.

These valuable and interesting volumes cover the same ground to quite an extent, but each has a particular interest and value of its own, and, taken together, they afford a minute and extensive view of the material facts and legal aspects of the most gigantic and momentous conflict of modern times.

In the introduction to Smith and Sibley's work there are some suggestive remarks on the deficiencies of International Law which the authors summarize as follows (p. 5) :

International law consists of rules to regulate relations which have a legal rather than a moral character; its treaties and controversies have assumed a legal guise, encouraged by a general willingness to increase their apparent obligatoriness. But it none the less remains broadly true that it is deficient in that coercive side of the term law which is above all others essential and characteristic. All civilized nations agree that they are bound by its principles, and in the majority of cases find it convenient to observe them. On the other hand, they are not infrequently broken, and breaches may be consecrated by adding successful violence to the original offense. In reality the sources of its strength are three: (1) A regard which in a moral community often flickers but seldom entirely dies; for national reputation is affected by international public opinion; (2) an unwillingness to incur the risk of war by any but a paramount national interest; (3) the realization by each nation that the convenience of settled rules is cheaply purchased on the whole by the habit of individual compliance.

Referring to the moral nature and evolutionary growth of international law, Professor Hershey says:

The usages observed during the Russo-Japanese war may serve to strengthen such customs as are in a state of imperfect development or to weaken still further such as are in a state of decay. In any case they are an index to the present condition of international morality.

Speaking of the object of their work, Smith and Sibley remark that many points of novelty have arisen, and, what is more important, one or two questions of far-reaching principle; and that "the real significance of the war from the point of view of public law lies in the indifference with which Russia has treated the rights of neutrals as those rights have been hitherto understood." The conduct of Japan is also examined and the authors are thus led into a discussion the scope of which is indicated by the titles of the various chapters, namely, "Belligerent Operations in Neutral Territory;" "Russia and the Passage of the Bosphorus;" "Declaration of War and Manifesto;" "Rights of War with Respect to Persons of Enemies;" "Espionage and Wireless Telegraphy in War;" "Laying Mines in Mid-ocean and Use of Balloons in War;" "The Principles of Neutrality and Special Usage Prohibiting the Construction and Outfit of Vessels of War;" "Belligerent Operations in Neutral Waters and the Chemulpho and Chefoo Incidents;" "Reception of Belligerent Cruisers in Neutral Ports;" "The Rule of the War of 1756;" "The Right of Visitation and Search;" "The Destruction of Neutral Vessels;" "International Arbitration, The Hague Convention and International Incidents Exhibiting Analogy to the North Sea Crisis, with a History of the North Sea Incident;" "The Law and Practice of Blockade;" and several chapters on contraband. There are also quite a number of appendices, including discussions of Prof. T. E. Holland's letter to the "Times" on the British Proclamation of Neutrality, and the Foreign Enlistment Act, 1870 (British), with special reference to the fact that a large fleet of German vessels was engaged in supplying Welsh coals to the Russian fleet.

This work was published prior to Professor Hershey's and he refers to it on several occasions, in one of which he characterizes it as "that bulky and pretentious volume," and he dismisses the author's opinion that the decision of the case of the *Allanton* by the prize court at Vladivostok is to be regarded as "an extension of the doctrine of continuous voyage" as "absurd as well as erroneous." There are occasional infelicities and obscurities of expression in the work,¹ but it will well

¹ On page 14, the authors say: "It is difficult not to regard her action in 1895 as not merely the overbearing, but even the exclusive, cause of the great war of 1904." On page 81: "As Vattel considered a person to be shot a spy,

repay a careful perusal by the student of international law and the reader who is interested in the history of his time.

Referring to Japan's conduct throughout the war with Russia, and especially to the cutting-out of the *Reshitelni* at Chefoo in August, 1904, Smith and Sibley say (p. 8) :

Japan has only once been brought into direct collision with public opinion, and even on that occasion the voice of authority was almost equally divided. The considerations involved in what is commonly known as the cutting-out incident are discussed in detail elsewhere. It may be fully conceded that the curiously artificial situation created by the partial neutralization of China by the belligerents lent strong support to the contentions put forward in the official Japanese apologia, but it is none the less permissible to regret that Japan should even for a moment have stood in the debatable land of international subtleties. Throughout the war her attitude has been one of intelligent correctness, "giving nothing away," in the current phrase, but taking no liberties with accepted international practice.

Professor Hershey severely censures Japan's conduct in the *Reshitelni* affair (pp. 260, 261), but he regards it as the only serious charge brought against her during her struggle with Russia.

The explanation of this singular example of a so-called "heathen" country in the practice of a legal and moral system which (although so largely derived from Roman jurisprudence) has been deemed peculiar to so-called "Christian" nations may be found, in part at least, from what follows (Smith and Sibley, pp. 8, 9) :

Few subjects in the astonishing curriculum of Japanese education have proved more attractive than the study of law. The law students in the University of Tokio are far more numerous than those of any other faculty, and it is stated that public law and international law are the favorite subjects of research. From the moment that Japan successfully asserted her claim to enter the concert of civilized nations she set aside some of the finest minds in the country to

it is impossible to cite him as disapproving of the manner of Major Andre's execution." On the same page: "As the disguise is admitted even by General Halleck to have been accidental, it is impossible to consider that Andre was a spy who is liable to a felon's death." On page 437: "This result is unsatisfactory and is contradictory to the practice of Lord Stowell. No decision of that great admiralty lawyer ever decided that a vessel which like the *Allanton* had genuine papers disclosing a neutral destination, and which was exactly in its proper course, could be confiscated. But it is astonishing to observe from the argument of M. Sheftel, of the Russian bar, that this conclusion can be supported by the principles of modern continental maritime law, and, in great part, from the Russian naval regulations." The decree of confiscation was reversed by the Russian Admiralty Council.

become the vigilant guardians of her international legality. She left as little as possible to the international law of the quarterdeck, and it is reported that jurists were attached to the staffs of her marshals to instruct and advise them in the subjects of their particular study.

Thus, in the Chinese war, Professors Takahashi and Ariga were appointed, respectively, to advise the navy and army, and in their accounts of the questions which arose for discussion made a permanent addition to the literature of the subject.

From the books which have been published by these Japanese professors² it appears how completely the most advanced of the modern laws of war were adopted and with what characteristic thoroughness they were applied by Japan, ten years earlier, in her struggle with China, although the Chinese prosecuted the war on a much lower plane. From the outset to the close of operations the military and naval authorities of Japan protected the persons and property of Chinese noncombatants in Japanese territory and applied the same rules to private property on sea as to private property on land, although a contrary policy was pursued by her enemy. The following example of this distinct advance, which we failed to follow in our war with Spain, is given by Professor Takahashi on pages 163 and 164 of his interesting little volume in the chapter entitled "The Japanese Requisition Regulations:"

On the 25th of October, 1894, when the Japanese navy was busily engaged in landing the second expeditionary army on the peninsula of Liao-tung, a good instance of naval requisition was furnished.

At the time nearly 20,000 troops had to be put ashore through the shallow water near the coast, and that so quickly and quietly as to be unnoticed by the enemy. A large quantity of timber was therefore required at once, to make rafts for facilitating the landing of horses, ammunition, provisions, etc.

Most conveniently a considerable number of Chinese ships laden with large balks of lumber passed off the place where the Japanese army was landing. The Japanese man-of-war *Oshima* and some other vessels were at once sent to bring them in to the coast. Thirteen of them were brought in and the timber on board was requisitioned, but the Japanese admiral was generous enough to pay a large price for it.

² Cases on International Law during the Chino-Japanese war by Saknye Takahashi, Professor of Law in the Imperial Naval Staff of Japan, Legal Adviser to the Admiral Commanding the Japanese Squadron during the Chino-Japanese war, etc., etc., with a preface by Professor T. E. Holland, D. C. L., and an introduction by Professor Westlake, Q. C., LL. D. Cambridge: At the University Press, 1899; London: C. J. Clay & Sons, Ave Maria Lane, and Stevens & Sons, Chancery Lane.

La Guerre Sino-Japonaise au point de vue du droit international. Par Nagao Ariga (le Professeur). Preface par Paul Fauchille. Paris: Pedone, 1896.

This generous principle was always followed during the whole of the war, as at Sa-lien, Port Arthur, Wei-hai-wei, Liu-king-tau, Sho-ping-tau, Yung-cheng, etc., wherever it was absolutely necessary to procure provisions or enlist labor for coaling and watering.

The most interesting feature of the above facts is that they furnish additional proof of Japan's resolve to conduct the war in accordance with the most civilized modern principles; and it must be noticed how honorable these actions are to Japan, especially when we remember that she was fighting against a nation which acknowledges no law of war, makes no provisions whatever for the proper treatment of the private property of the subjects of a hostile state, and does not attempt by a resolute effort to restrain its troops from pillage and incendiarism, even within its own territories.

It thus appears that ten years before her war with Russia, Japan took the lead in the application of the idea that war is a contest between the armed forces of the belligerent states and not between their noncombatant individual members on land or sea.

Referring to the Japanese requisition regulations in force during the war with China, Professor Takahashi says:

The general principle underlying them is that the peaceful inhabitants of an enemy's country must not be required to discharge any services other than those essential to the maintenance of the invading army or the promotion of its military capacity, and that all services rendered by the people under such requisitions must be duly recompensed.

This is the accepted modern doctrine as to private property of the enemy on land, not contraband of war, but, as well known, it has not been applied to private enemy property under the enemy's flag at sea, which is still subject to capture and confiscation; and the proceedings at The Hague have shown that there is powerful opposition to the proposed immunity of private enemy property at sea.

In one of the most interesting chapters of Professor Hershey's book ("Russian and Japanese Rules of Warfare," pp. 267-294) is found another remarkable illustration of the civilization to which Japan has attained, namely, a note which was addressed by the Minister of Public Instruction to the school teachers of Japan in the following terms:

Although the Imperial Government is at present at war with Russia with the purpose of later securing a permanent peace, the students and pupils should make it their special aim to show themselves in no wise hostile toward Russian subjects. Such hostility on their part would give foreign nations a bad opinion of us. Besides, this is an important point to be considered in the education of boys and girls.

It must not be thought, however, that the mass of the people have reached this high level, for it seems that terrible excesses were committed by the Japanese at the fall of Port Arthur,³ and outrages and cruelties of the grossest character are reported as committed by the Japanese in their present occupation of Korea. On this subject an eye-witness says:

But to beat defenseless old women, to insult inoffensive foreigners as well as Koreans, to murder scores of men simply for protesting against being robbed of their property, and to crucify and then to shoot (I have the photographs) men who actively resent having their houses stolen — this comes near to barbarism. After what my own eyes have seen I can scarcely doubt the assertions, heard on every side, that every white man in Korea, except one American employed by the Japanese Government, is now earnestly opposed to the conduct of the Japanese, though when the late war began the great majority of them were pronouncedly in favor of Japan's cause.⁴

This, if true, is as bad as the spoliations and murders of the Chinese by our hoodlums and "sand-lotters," who went unpunished, and it is to be hoped that in restraining and punishing such outrages Japan will furnish an example of timely and impartial justice.

It is inspiring to read such instructions as the following from the Czar to the noncommissioned officers and soldiers of the Russian armies in Professor Hershey's chapter on "The Rules of Warfare" (p. 280):

You are to wage war with the troops of the enemy and not with the peaceable inhabitants.

The inhabitants of the enemy country may also be enemies, but only in case they are seen with arms in their hands.

Strike the enemy in loyal combat. Do not strike the enemy who is disarmed and who begs for quarter.

Respect foreign religions and temples.

Do not injure the peaceable inhabitants of the enemy country; do not take away or injure their goods, and restrain your comrades from doing these things. Cruelties to the inhabitants only increase the number of our enemies. Remember that the military man is the soldier of Christ and the Czar; this is why he should conduct himself like a Christian soldier.

After the battle is ended, you should be considerate of the wounded, and try to aid them without distinguishing whether they are our own people or not. The wounded are no longer enemies.

³ It is only fair to say that Professor Takahashi, an eye-witness, gives a different version on pages 4-8 of his "International Law during the Chino-Japanese War." The excesses were committed by the Japanese in the fury of battle and at sight of the bodies of their comrades who had fallen in the assault and been tortured and mutilated by the enemy.

⁴ "Some Guesses at Japan," by Wm. T. Ellis in *The North American Review* for October, 1907, pp. 240, 241.

Professor Hershey's comparison of the rules of the belligerents, as published, for the conduct of the war with the rules as prescribed in The Hague Convention, to which both Russia and Japan were parties, is of great interest and no little encouragement.

In Russia's instructions to her commissioned officers for their guidance in the enemy's country they are informed that compulsory supplies and services can be exacted only by authority of the commander-in-chief of the army, or of the chief of the military administration of the district, and article 20 reads as follows:

The supplies and services are to be paid for as far as possible in cash; otherwise the troops are expected to give receipts, signed and sealed by the chiefs of detachments and companies.

It will probably never be known to what an extent the observance of these instructions (especially those of Japan for the treatment of prisoners) and the spirit that inspired them ameliorated the horrors of war and changed race hatreds and prejudices into kindly regard and lasting friendship in thousands of individual cases.

Judging by the internments of Russian vessels which sought refuge in neutral ports after receiving serious injuries in battle, and the protests against certain of Russia's seizures and condemnations of merchant vessels and their cargoes, the tendency seems to be to a stricter observance and enforcement of both the duties and rights of neutrals. These internments occurred within the jurisdictions of four different Governments — Germany, China, the Netherlands, and the United States.

In a note on page 209 Professor Hershey refers to a distinction which is said to have been drawn by Secretary Taft between the disablement of a war vessel caused by a storm or by an explosion or other accident on board, on the one hand, and the damage suffered in battle on the other. Upon this the *Sun* observed:

The distinction is a just one. It is obvious that a neutral power which should open its ports to vessels that had been crippled by the enemy, for the purpose of enabling them to again take to the sea for an aggressive purpose, would not be exercising impartiality but really acting as the ally of a belligerent.

Professor Hershey explains that his object in his chapter on "The Relations between England and the United States as affected by the Far Eastern Question and the War," is to try to show how the coöperation of England, Japan, and the United States in the Far East has strengthened the friendship between England and the United States so auspiciously *formed* during the Spanish-American war. The Professor

seems to think that the friendship between Great Britain and the United States did not exist before the Venezuelan boundary dispute, or that it died and was buried during that episode, and came to a new birth during the Spanish-American war. He says:

Only a decade ago the American people, almost to a man, were roused to a frenzy of patriotic fervor by President Cleveland's startling message of December, 1895, threatening England with war unless she consented to submit a boundary dispute between herself and Venezuela to arbitration.

It may truthfully be said that Great Britain never gave such a signal proof of her friendship for the people of the United States as in the attitude she took and the course she followed when suddenly confronted with that extraordinary and astounding intervention. If the friendship of the United States for Great Britain had not been so deep-seated there would not have been such an apprehension of evil — such a sinking of heart — such a depreciation of values. It was not capital alone that was shocked and terrorized; it was this very friendship — of the existence of which the Professor seems to have been unconscious — a friendship involving all the ties and interests of race and language, tradition, inheritance, and a common civilization.

This is not the place to discuss the question whether the threatened intervention was justified or in any way defensible; it is sufficient to suggest here that the friendship between the United States and Great Britain was neither nonexistent in 1895, nor "formed" a few years later, "during the Spanish American war."⁵

If any other power but the United States (says Sir Thomas Barclay in his "Problems of International Practice and Diplomacy") had been concerned, there is little doubt that such intervention would have exposed the two countries to a very dangerous state of feeling; for although Great Britain did not pick up the glove thus thrown down, the whole world was deeply impressed. In three days the value of American securities is estimated to have fallen by £100,000,000, and a panic on December 20 obliged the President to issue a fresh message in the afternoon to reassure the public.

⁵ The following is an extract from a statement of the controversy published in the *Cyclopedic Review* (Columbian Annual) for 1895, pages 786, 787:

"The possibilities of a war between Great Britain and the United States over the Venezuelan question were seriously discussed by the press of both countries in December [1895], but the temporary ebullition of war sentiment quickly subsided, save in those few hearts in which it is perennially cherished, and served only to demonstrate more strongly by contrast the real feelings of sympathy and solidarity still prevailing between the great nations of the English-speaking world."

Professor Hershey's closing chapter deals with "The Treaty of Portsmouth," the text of which is given in full. This treaty the Professor says is interesting and important for three reasons: In the first place, because of the leading part played by President Roosevelt in inaugurating and influencing the conduct of the negotiations; secondly, because of the controversy with regard to the question of indemnity; and, thirdly, because, taken in connection with the Anglo-Japanese offensive and defensive alliance signed on August 12, 1905, it settled, for a time at least, the status of the combatants (and incidentally, too, that of other leading nations of Europe and America) in the Far East.

Instead of the President's mediation being open to criticism as intrusive or unwarranted, it was tendered, as Professor Hershey shows, in accordance with article 3 of the first convention of The Hague Conference of 1899, to which Russia, Japan, and the United States were parties, and which provided that the right to offer good offices or mediation belongs to powers who are strangers to the dispute, even during the course of hostilities; and that the exercise of this right shall never be considered by one or the other parties to the contest as an unfriendly act.

If the First Hague Conference did not prevent that colossal struggle, it helped, by authorizing and inviting the good offices of neutral powers, to bring it to an earlier and happier close.

CRAMMOND KENNEDY.

La Proprietà Privata Nelle Guerre Marittime Secondo Il Diritto Internazionale Pubblico, by Tullio Giordana. Turin and Rome. Società Tipografico-Editrice Nazionale. Five lire.

In view of the attention being paid at the present time in periodicals specializing the study of international law to the various questions of "maritime" and "prize" law, the present publication by the editor of *La Tribuna*, of Rome, has a special value. The plan of the work is indicated by the following extract which we translate from the preface:

It is not the doctrines or the writings of men which cause the world to move on, but rather the collective forces of the masses that not infrequently find interpreters among the publicists. If some thinker is credited with having had a measure of influence in his day, like Voltaire or Beccaria, it is because he knew how to express a reform which had already been silently accomplished in the conscience of the people. He did not originate, but merely demonstrated civilization. Progress would have been accomplished just the same without a day's delay by the law of fate. Like the physicist who does not concern himself as

to how natural laws should operate, but contents himself with stating them as he finds them and using them as they are, we will endeavor to set forth public international law in so far as it concerns private property in maritime war according to its actual existence which it derives from the general recognition which is received at the hands of nations or from the insistence of its use. While specially bearing in mind the practical utility of the book we are submitting, we will, therefore, prefer to gather recent cases and the decrees bearing thereon to furnish in an eventuality (to which may the fortunes of the Fatherland avert) an immediate criterion with the aid of precedents for the officers of the navy, for whose special benefit this work has been prepared.

The fundamental idea of the work being thus traced, the writer discusses successively, in the light of recent events, the utterances of the authors relative to the question of the inviolability of private property in maritime warfare, following with a consideration of reprisals, retorsion, embargo, and pacific blockade, incidents of the opening of hostilities, bombardment, exercise of the right of seizure, the effect of the declaration of war upon neutrals, what constitutes contraband of war, the law of blockade, right of visit, the preliminary steps necessary in connection with legal seizure, the constitution of courts of prize, closing with a copy of the imperial Russian decree determining contraband of war in the recent Russo-Japanese conflict and the declarations of the Japanese Government with relation to the same matter.

In view of recent discussions in this Journal, it is worthy of note that the doctrine of the *Springbok* case relative to continuity of voyages is accepted without question.

The work will prove of value to those studying the particular subjects indicated by this brief review.

JACKSON H. RALSTON.

Commerce in War. By L. A. Atherley-Jones, K. C., M. P., assisted by Hugh H. L. Bellot, D. C. L. Methuen & Co., London. 1907.

International law has shown such rapid growth during the last half century that it is becoming increasingly difficult to treat it as a whole in any single book, however voluminous. The authors of this treatise, in confining themselves to the consideration of but one of the fields of international concern, have made it possible to set forth with some fullness the processes by which the law affecting that has been evolved, whether these are found in public transactions or in the use made of private opinion, expressed by jurists of repute. Mr. Atherley-Jones is a

barrister of thirty years' standing, and has previously published, with the aid of the same collaborator, a work of local interest to those interested in the statutory regulation of English coal mines.

He is a National Liberal in politics, and quite ready to criticise the action of the present ministry in any matters of foreign policy in which he is of opinion that another course should have been taken. Thus, the sinking of the *Knight Commander* by the *Petersburg*, in 1904, seems to him wholly indefensible, even if the *Petersburg* could be regarded as a man-of-war. The Russian claim, supported by Professor Holland, that a belligerent may sink a neutral ship carrying contraband, if it be so inconvenient as to be practically impossible to bring her to one of its ports for an adjudication on a proper libel, he declares totally inadmissible; and, he adds (p. 543), "it is time to vindicate what we, as the great mercantile power, believe to be the principles of international law and usage. To wait for such vindication until Russia has regained her strength may be generous, but it is not politic." The conclusion that the Russian claim is unsound may be admitted, though in this work it is by no means supported by as full a treatment as the question received from Professor Hershey in his "International Law and Diplomacy of the Russo-Japanese War;" but the tone of political criticism in which it is expressed tends to detract from its intrinsic weight.

In the desire of the authors of this treatise to make it exhaustive, it may be doubted whether they have not included in their statement of the sources of the international law governing certain questions much that really has but a very slight and remote connection with it. Thus, in explaining the term "contraband of war" they treat (p. 7) as the first recorded instances of governmental regulation of the subject the Roman imperial decrees found in the Code, Book IV, title 44, *quae res exportari non debeant*. In these the exportation of wine, oil, or other liquors for sale to the people of other nations (*barbari*) is prohibited, and the sale of arms to any such who may be in the imperial dominions is made punishable by death. These are commercial regulations, affecting intercourse with foreigners in time of peace, and bear no more relation to what we understand by contraband than would the ancient English statutes forbidding the exportation of wool or undyed cloths.

In discussing the inclination in recent years to extend the meaning of "contraband" so as to make it cover coal, provisions, and stores of various kinds to which that character was not formerly attributed, an interesting decree of the Supreme Prize Court of Russia is given, which was rendered in 1905, in the case of the *Calchas*. The Vladivostok

court of admiralty had upheld the seizure, as lawful prize, of flour on board an English steamer bound for Japan and carrying mails addressed to the Japanese Government, but which could have no direct influence on the prosecution of the war. The Supreme Prize Court, Professor Feodor de Martens being a member, reversed the decree, on the ground that flour, under the imperial order of February, 1904, was only the subject of prize when transported for the account of or destined for the enemy, and that "enemy" here meant only the Japanese Government or its agents, not private consignees, though they might be its subjects. It also declared that the rules of the Universal Postal Union and, thanks to that, the resolution of The Hague Conference of 1899 as to free delivery of letters and packages to and from prisoners of war were so inconsistent in spirit with the claim that every mail steamer taken with despatches to a belligerent power was lawful prize, that the order of 1904 could not have been meant to give it any support (p. 88).

Valuable chronological tables are given in this connection, of diplomatic documents (p. 54) and of reported cases in the English and American courts (p. 67).

There is a similar list of over a hundred English and American cases on blockades (p. 185).

The doctrine of pacific blockades is pronounced, however convenient politically, to be hardly defensible in principle, owing to the extreme difficulty of keeping it pacific. "A country is not at liberty to escape the inconveniences of war merely by asserting the peaceful character of its violence" (p. 115).

Occasionally, quotations from a decision easily accessible are made at such a length as to seem out of proportion to the general scheme of the work. Thus, ten pages are given (p. 227) to the old case of the *Franciska*, before the Privy Council. While it would be hardly justifiable to call this padding, it comes much too near to that.

Mr. Atherley-Jones has no patience with the American edition of the Continuous Voyage theory. When Dr. Hall called the doctrine of the *Springbok* case the fruit of "passion and ignorance," he thinks the reproach was "not unsupported by facts," for which it is to be confessed that some unguarded and often-quoted remarks of Justice Nelson give not a little justification (p. 256, note).

Another doctrine of the Supreme Court of the United States is sharply and justly criticised. It is that in the *Peterhoff* case (5 Wallace's Reports, 28) in which Chief Justice Chase observed (p. 59) that "the trade of neutrals with belligerents in articles not contraband is

absolutely free unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea." These words seem to justify the seizure by a belligerent of contraband of war on board a neutral ship on the high seas, a thousand miles from any port of the enemy, and the authors of the treatise under review say that "it is a proposition entirely unheard of before the middle of the nineteenth century, and it derives no sanction from the practice of any maritime war." In truth, Chase won his laurels as a jurist in the field of constitutional rather than of international law.

A particularly valuable table is inserted (p. 347) of the ship's papers required under the respective practice of seventeen of the leading sea powers.

In general, it may be said that the authors have availed themselves little of the course of judicial decision, and of the opinions of individual jurists in recent times, except for what they have found in English, or American, or French sources. One would hardly suppose from this treatise that Germany, Italy, Spain, or Holland had made in our day any considerable contributions towards systematizing and defining the rights of belligerents over neutral trade.

The book is clearly written and pointedly phrased, as where it is observed that in respect to the rule of "*free ships, free goods*," the conduct of Russia "has been uniformly inconsistent" (p. 289). Its typographical dress is excellent, and the index quite full and conveniently arranged for ready reference.

SIMEON E. BALDWIN.

Problems of International Practice and Diplomacy with Special Reference to The Hague Conferences and Conventions and other General International Agreements. By Sir Thomas Barclay, of Lincoln Inn, Barrister at Law, Member of the Institute of International Law, Vice-President of the International Law Association, Judge of the Supreme Court of Appeal at Brussels of the Independent State of the Congo, etc. London: Sweet & Maxwell, Ltd., 3 Chancery Lane. Boston, Mass., U. S. A.: Boston Book Co., 83-91 Francis Street.

This is the work of a master, the object and scope of which are best explained in his own words. After observing that the spirit of law and order does unquestionably progress, not only in the domestic polity of nations but also in relations between state and state, and that the growth

of this spirit as between state and state has largely been due to direct and conscious effort, as will be seen in every chapter of his book, the author says:

My object has, therefore, been to single out these cases of direct and conscious effort, and to endeavor to isolate the ethical principles or reasons of expediency which seem to have underlain their application, and to utilize them for the solution of other kindred problems.

The result is a series of papers on important questions of international law and practice which have come up at The Hague and other international conferences for discussion and for such action by way of conventions, recommendations, or expressions of opinion as the delegates may think proper to submit for the consideration of their respective governments. These papers have been submitted by the author to his colleagues of the Institute of International Law and other friends conversant with such studies, and without mentioning their names he indicates their views, especially when they differ from his own, and he does this with a frankness and impartiality inspired by a sincere desire to ascertain what is required by justice and may be worked out satisfactorily in practice.*

There is an introductory note on the work of the Second Hague Conference, and the author discusses in separate chapters more than twenty topics of international interest, including the "Extension of the Scope of Arbitration Treaties and of the Jurisdiction of The Hague Court;" the exception of "Vital Interests and National Honour;" the "Proposed Modifications in the Procedure of the Hague Court;" the "Further Codification of the Law and Customs of War in General;" "Immunity of Private Property on Sea from Capture," with a note on "Proposal of National Indemnity for Captures in Time of War;"

*In his preface the author makes the following explanation of the unusual form in which his work is printed:

"The form of this volume requires explanation. It has already been privately issued, partly in fragments and partly as a confidential memorandum, for the consideration of my colleagues of the Institute of International Law, different government departments at home and abroad, and others.

"The wide margins and blanks were left for the insertion of new matter and the convenience of the specialist readers whose views on different points I had solicited. As they may also prove serviceable to the reader of a book of this kind generally, and changing the form would have entailed delay and labor out of proportion to the resulting advantage, I hope I may be pardoned for in this respect not adhering strictly to time-honored traditions of book production."

"Limitation of the Area of Visit and Search;" "Exclusion of Specific Areas from Hostilities and Neutralization by Proclamation," with notes on the "Neutrality of the Congo Basin;" "Buffer Zones," and the "Practical Neutralization of American Frontier Lakes."

There are also chapters on the "Revision of the International Law of Neutrality," with a note on the "Use by Belligerents of Neutral Ports;" "Contraband of War," with a note on the "Anglo-Russian Controversy concerning Definition of Contraband;" the "Contractual Limitation of Armaments;" the "Principle of the Open Door;" and the "Effect of the 'Most-Favored-Nation' Clause in Commercial Treaties."

In the chapters on the proposed "Immunity of Private Property at Sea from Capture" the author remarks that this proposition represents a traditional policy of the United States, and he cites the following observations made by Benjamin Franklin as long ago as 1783 in the course of treaty negotiations with Great Britain at the close of the War of the Revolution:

It is for the interest of humanity in general that the occasions of war and the inducements to it should be diminished. If rapine is abolished, one of the encouragements to war is taken away, and peace therefore more likely to continue and be lasting. The practice of robbing merchants on the high seas, a remnant of the ancient piracy, though it may be accidentally beneficial to particular persons, is far from being profitable to all engaged in it or to the nation that authorizes it.

The author also cites the article proposed by Franklin⁷ on this subject for the treaty then under discussion (p. 63) and refers to the refusal of the United States to sign the Declaration of Paris because the powers refused to make private property immune at sea — citing what follows from President Pierce's message to Congress in 1854:

The proposal to surrender the right to employ privateers is professedly founded upon the principle that private property of unoffending noncombatants, though enemies, should be exempt from the ravages of war; but the proposed surrender goes but little way in carrying out that principle which equally requires that such private property should not be seized or molested by national ships of war. Should the leading powers of Europe concur in proposing, as a rule of inter-

⁷ In this connection it may be interesting to refer to Article XII of the treaty between the United States and Prussia, concluded Sept. 10, 1785, which provided that free vessels should make free goods. This treaty was signed, on the part of the United States, by Benjamin Franklin, Thomas Jefferson and John Adams. See also Article XIII of the same treaty and Articles XII and XIII of the treaty of July 11, 1799, between the same powers.

national law, to exempt private property upon the ocean from seizure by public armed cruisers as well as by privateers, the United States will readily meet them upon that broad ground.

The author recalls that in 1870 Count Bismarck telegraphed to the Prussian minister at Washington that private property on the high seas would be exempted from seizure by His Majesty's ships without regard to reciprocity, but that this exemption was not maintained by Prussia. Both Austria and Prussia had observed the principle in 1866. In 1871 the United States concluded a treaty with Italy which provided (Article XII) that in the event of war —

The private property of the citizens and subjects (of the contracting States) with the exception of contraband of war, shall be exempt from capture or seizure, on the high seas or elsewhere, by the armed vessels or by the military forces of either party; it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party.

The United States did not show its faith in this principle by its works in its war with Spain, but when the war was over and the opportunity gone President McKinley made the following observations on the subject in his message of December, 1898, to Congress (cited by our author, pp. 64, 65) :

The experiences of the last year bring forcibly home to us a sense of the burdens and the waste of war. We desire, in common with most civilized nations, to reduce to the lowest possible point the damage sustained in time of war by peaceful trade and commerce. It is true that we may suffer in such cases less than other communities, but all nations are damaged more or less by the state of uneasiness and apprehension into which an outbreak of hostilities throws the entire civilized world.

It should be our object, therefore, to minimize, so far as practicable, this inevitable loss and disturbance.

This purpose can probably best be accomplished by an international agreement to regard all private property at sea as exempt from capture or destruction by the forces of belligerent powers. The United States Government has for many years advocated this humane and beneficent principle, and is now in a position to recommend it to other powers without the imputation of selfish motives. I therefore suggest for your consideration that the Executive be authorized to correspond with the governments of the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerent powers.

Sir Thomas observes that resolutions were introduced in both Houses of Congress endorsing this recommendation, final action on which was prevented by the shortness of the session, "but the sentiment which was developed was overwhelming in favor of adopting the rule of exemption under proper restrictions as to contraband and blockade. Congress at the same session passed the naval personnel bill, which abolished prize money, thus removing one of the strongest incentives for capture of private property, and eliminating all questions as to the rights of seamen and officers."⁸

Sir Thomas proceeds as follows:

The subject, it is seen, has been consistently kept in the foreground by successive Presidents, and it has repeatedly been brought to the notice of foreign governments; but owing chiefly to the unwillingness of Great Britain to countenance change in the existing practice, acquiescence on the part of other governments has remained until now without effect.

He then takes up the proposition made in 1899 by the American delegates at The Hague Conference and says it is wanting in clearness. "The words 'or seizure,' in the phrase 'exempt from capture *or seizure*' — which, by the way, are borrowed from the Italo-American Treaty of 1871 — do not tally with the reservation as to contraband. Seizure may be indispensable to ascertain whether the arrested vessel has contraband on board or not." *Search* would show whether the arrested vessel carried contraband or not in the opinion of the belligerent, but the question might need to be finally determined by a prize court. Be this as it may, Sir Thomas proceeds to show what has been said on the other side of the case, and what difficulties might arise in putting the exemption into practice. Here, as in all his discussions, or, as he modestly calls them, his suggestions, is the value of his work. He gives a fair view of both sides, and thus assists those who are on the right side in making a clearer elucidation, a better defense, and a more practical application of their principles.

We do not enter further into this interesting discussion or touch upon the many other topics presented in this valuable work because we hope our readers will obtain it and examine it for themselves.

Another valuable feature of this work, especially for those who participate in conferences upon international questions or the preparation of state papers, is a series of "Suggested Draft Treaties and Clauses."

⁸ Butler, *op. cit.*

For example, we have a "Draft Arbitration Treaty to include Vital Interests and National Honor," and a "Model Protocol of Submission for Cases of Minor Importance;" and there are "Clauses for Reference as to the Effect of Most-Favored-Nation Clause to The Hague Court." There is also a "Tentative Draft Treaty for Assimilation of Belligerent to Neutral Private Property at Sea," with a "Form of Agreement as to Proclamations of Neutralization"⁹ and a "Protocol for Institution of a Commission to consider all Questions raised but left in Abeyance by The Hague Conference of 1907."

Among the appendices which enrich the work are The Hague Conventions, Declarations, etc. (1899), with English translations; a "Table of the Ratifications by the Powers," with dates and reservations; the "Convention relating to the Status of Hospital Ships," signed at The Hague, December 21, 1904, with a list of the ratifying powers; the "Revised Geneva Convention" of July 6, 1906; "Official Correspondence as to Judges of The Hague Court acting as Advocates in Cases before It;" the "Declaration of Paris," April 16, 1856; the "Treaty between Great Britain and the United States to facilitate the construction of a ship canal to Connect the Atlantic and Pacific Oceans;" with other interesting and important state papers.

The public in general and especially students of international law and participants in international affairs owe a debt of gratitude to Sir Thomas Barclay for this learned, luminous, and unique contribution of his to the literature of the subject and the advancement of international justice and peace.

CRAMMOND KENNEDY.

Arbitration in Latin America. By Gonzalo de Quesada. Wyt & Zonen, Rotterdam. 1907.

In well-written English, His Excellency Señor Quesada has published a brochure of 136 pages dealing with the attention which the subject of international arbitration has received in Latin America. It was a very happy idea which impelled His Excellency, as delegate to the Second Peace Conference at The Hague (the first conference in which the Latin American states, except Mexico, were to participate), to set forth concisely the consideration heretofore given by these states to the peaceful settlement of international controversies.

⁹ What the author submits on this subject (pp. 73-78, 180, 309, 314) is of special interest apropos of recent propositions for the independence and neutralization of the Philippines.

Speaking of international arbitration, His Excellency says:

Latin America has done its share in that humanitarian labor. * * * Europe and the Old World in general have been too busy, during the last three-quarters of a century, to take notice of the struggle for nationality and the development of liberty and justice in Latin America, known mostly by its internal commotions. Yet, in the midst of these intermittent shocks, Latin America, from the very day of its emancipation, espoused arbitration and appealed to it in its international relations. It encouraged and fostered it in conferences, by treaties, and through its constitutional provisions. It will be seen how more than half a century before the First Hague Conference it forecast arbitration, its form, its field, its mode of application, and how, notwithstanding the failure to accomplish the immediate and final results, Latin America has continued undaunted upwards and onwards toward the ideal.

The first chapter of the book traces the history of the arbitration movement in Latin America previous to the First Pan-American Conference called in 1888 by the United States. It is an interesting fact that beginning in 1822 with the call of the Great Liberator Bolivar, four international conferences were initiated by the Latin American states themselves. Although these conferences failed to secure the adoption of any effective general treaty of arbitration, they did call forth at one time or another from nearly every Latin American state unqualified approval of this method of settling disputes. Undoubtedly, the thought given the subject accounts for much of the zeal shown by the Latin American states in responding to the call for the First Pan-American Conference.

After tracing the proceedings of the First, Second, and Third Pan-American Conferences and quoting liberally from the speeches, reports, and treaty projects, Señor Quesada takes up each of the Latin American states and shows the provisions which have been formulated upon international arbitration in their constitutions and treaties. One is surprised at the large amount of attention which these states have given this subject during their somewhat tumultuous existence and appreciates the timeliness of this little book and the service which His Excellency has rendered English readers in preparing it.

Report of the Thirteenth Annual Meeting of the Lake Mohonk Conference on International Arbitration, 1907.

The failure of the Second Hague Conference to justify the anticipations of those devoted souls whose chief passion is the promotion of international peace throws a cold, white light of disillusionment on the pro-

ceedings of the Lake Mohonk Conference, just given to the world. Perhaps it was to be expected that the accredited representatives of the powers assembled at The Hague during the past summer should devote the greater part of their attention to the framing of rules for the regulation of wars between nations rather than to the consideration of measures for the avoidance of wars, but certainly the First Hague Conference had encouraged the hope of better things. This hope loomed large in the minds of the Lake Mohonk conferees, was the inspiration of the many notable addresses to which they listened, and is bodied forth in the resolutions adopted and promulgated by them. The wide divergence between the hope and its fulfillment has its valuable lesson for the members of the conference — alike for those who feared the intrusion into the resolutions and debates of anything “unpractical” — *i. e.*, of anything not likely to prove acceptable to the delegates at The Hague — as for those who came away from the conference with the feeling that its fires were burnt out and its usefulness at an end; that its devotion to the immediately practical was an abandonment of its noble function of leadership toward an ideal too high to be attainable, too remote and yet too secure to be seriously affected by the deliberations of the next conference of the powers. Future meetings of the conference may gain both in freedom and effectiveness from the discovery that things are not what they seem, that the practical at Lake Mohonk may be the unattainable at The Hague, and that the stone rejected by the builders may yet become the head of the corner. It remains to be said that of the six resolutions of the Conference, dealing, respectively, with (1) the provision of stated meetings of The Hague Conference, (2) the conversion of the Hague Court into “a definite judicial tribunal,” (3) the adoption of a general arbitration treaty, (4) the inviolability of innocent private property at sea, (5) the Drago Doctrine, and (6) the neutralization of trade routes, only two — the second and fifth — secured complete recognition by the conferring powers at The Hague, though the first and third were approved in principle.

Among the more notable addresses delivered at the conference especial importance attaches to President Nicholas Murray Butler's philosophic review of the conditions affecting the work of the coming Hague Conference, to the messages of good-will brought by the Mexican ambassador and the Bolivian minister from their respective countries, and to the spirited address in which Admiral C. F. Goodrich vindicated the pacific attitude of the United States Navy. The two distinguished representatives of Spanish America joined in urging the adoption of the principle

embodied in the Drago Doctrine, and emphasized the contribution made by Mexico and South America to the practice of arbitration. Among the more important addresses by other speakers were those of Mr. Alfred K. Smiley, the father of the conference; "Some Hints as to the Future Work of The Hague Conference," by Hon. Andrew D. White; "Respect for International Law," by Hon. Simeon E. Baldwin, Chief Justice of Connecticut, and "Pan-American Interest in International Arbitration," by Hon. John Barrett, Director of the Bureau of American Republics. An appendix to Mr. Barrett's address contains brief reports from the Spanish-American ministers in Washington covering the records of their respective countries in the matter of arbitration. The educational aspects of the movement for international arbitration were presented in elaborate papers by Hon. Andrew S. Draper, Commissioner of Education for the State of New York, and Hon. Elmer E. Brown, United States Commissioner of Education, and in briefer discussions by Prof. John Bassett Moore, President Charles W. Eliot, President Rush Rhees, Prof. Joseph H. Beale, Prof. W. W. Willoughby, and others.

One entire session of the conference was devoted to a series of brief addresses by representative men of affairs on the topic "Business Men and International Arbitration." As a demonstration of the widespread interest of the business world in the subject of international peace, the twenty-two addresses delivered on this occasion were most convincing. It may be doubted if the Lake Mohonk Conference has in the dozen years of its existence done a more effective piece of work than in bringing home to business men their paramount interest in the cause which the conference was instituted to promote. Mention may be made in this connection of the forcible argument in favor of the inviolability of private property at sea by the German publicist and statesman, Dr. Theodor Barth. When it is added that those apostles of peace and good-will, Rev. Edward Everett Hale, Justice David J. Brewer, and Benjamin F. Trueblood, took an active part in the deliberations of the conference, the record may be regarded as complete.

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